NORTH CAROLINA

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ANNOTATED

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1996 CUMULATIVE SUPPLEMENT

VOLUME 13

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THE GENERAL STATUTES OF NORTH CAROLINA

ANNOTATED

1996 CUMULATIVE SUPPLEMENT

Volume 13

Chapters 90 through 97

Prepared under the Supervision of

The Department of Justice
of the State of North Carolina

BY

The Editorial Staff of the Publishers

Under the Direction of

D. S. Tussey, K. S. Mawyer, R. B. Layne,
K. J. Kennedy and F. J. Payne

Annotated through 470 S.E.2d 425. For complete scope of annotations, see scope of volume page.

Place Behind Supplement Tab in Binder Volume. This Supersedes Previous Supplement, Which May Be Retained for Reference Purposes.

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Preface

This Cumulative Supplement to Volume 13 contains the general laws of a permanent nature enacted by the General Assembly through the 1996 Second Extra Session, which are within the scope of such volume, and brings to date the annotations included therein.

Amendments are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings.

Chapter analyses show all affected sections, except sections for which catchlines are carried for the purposes of notes only. An index to all statutes codified herein will appear in the Replacement Index Volumes.

A majority of the Session Laws are made effective upon ratification, but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after 30 days after the adjournment of the session" in which passed.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute is cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Cumulative Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to Michie, Law Publishers, Charlottesville, Virginia.

User's Guide

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the North Carolina General Statutes, a User's Guide has been included in Volume 1. This guide contains comments and information on the many features found within the General Statutes intended to increase the usefulness of this set of laws to the user. See the main volume for the complete User's Guide.

Scope of Volume

Statutes:

Permanent portions of the General Laws enacted by the General Assembly through the 1996 Second Extra Session affecting Chapters 90 through 97 of the General Statutes.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports through Volume 343, p. 303.
North Carolina Court of Appeals Reports through Volume 121, p. 513.
South Eastern Reporter 2nd Series through Volume 470, p. 425.
Federal Reporter 3rd Series through Volume 83, p. 1423.
Federal Supplement through Volume 924, p. 224.
Federal Rules Decisions through Volume 165, p. 700.
Bankruptcy Reports through Volume 195, p. 823.
Supreme Court Reporter through Volume 116, p. 1711.
North Carolina Law Review through Volume 74, p. 1319.
Wake Forest Law Review through Volume 30, p. 1008.
Campbell Law Review through Volume 18, p. 201.
Duke Law Journal through Volume 45, p. 1088.
North Carolina Central Law Journal through Volume 25, p. 100.
Opinions of the Attorney General.

The General Statutes of North Carolina
1996 Cumulative Supplement

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ARTICLE 1.

Practice of Medicine.

§ 90-2. Medical Board.

(a) In order to properly regulate the practice of medicine and surgery for the benefit and protection of the people of North Carolina, there is established the North Carolina Medical Board. The Board shall consist of 12 members.

(1) Seven of the members shall be duly licensed physicians elected and nominated to the Governor by the North Carolina Medical Society.

(2) Of the remaining five members, all to be appointed by the Governor, at least three shall be public members and at least one shall be a physician assistant as defined in G.S. 90-18.1 or a nurse practitioner as defined in G.S. 90-18.2. A public member shall not be a health care provider nor the spouse of a health care provider. For purposes of board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care

professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) No member appointed to the Board on or after November 1, 1981, shall serve more than two complete consecutive three-year terms, except that each member shall serve until his successor is chosen and qualifies.

(c) In order to establish regularly overlapping terms, the terms of office of the members shall expire as follows: two on October 31, 1993; four on October 31, 1994; four on October 31, 1995; and two on October 31, 1996.

(d) Any member of the Board may be removed from office by the Governor for good cause shown. Any vacancy in the physician membership of the Board shall be filled for the period of the unexpired term by the Governor from a list of physicians submitted by the North Carolina Medical Society Executive Council. Any vacancy in the public membership of the Board shall be filled by the Governor for the unexpired term.

(e) The North Carolina Medical Board shall have the power to acquire, hold, rent, encumber, alienate, and otherwise deal with real property in the same manner as any private person or corporation, subject only to approval of the Governor and the Council of State as to the acquisition, rental, encumbering, leasing, and sale of real property. Collateral pledged by the Board for an encumbrance is limited to the assets, income, and revenues of the Board. (1858-9, c. 258, ss. 3, 4; Code, s. 3123; Rev., s. 4492; C.S., s. 6606; Ex. Sess. 1921, c. 44, s. 1; 1981, c. 573, s. 2; 1991 (Reg. Sess., 1992), c. 787, s. 1; 1993, c. 241, s. 2; 1995, c. 94, s. 1; c. 405, s. 1.)

Effect of Amendments. — Session Laws 1995, c. 94, s. 1, effective May 22, 1995, substituted "Medical Board" for "Board of Examiners" in the section catchline; substituted "the North Carolina Medical Board" for "a Board of Medical Examiners of the State of North Carolina" in subsection (a); and substituted "North Carolina Medical Board" for "Board of Medical Examiners" in subsection (e).

Session Laws 1995, c. 405, s. 1, effective October 1, 1995, deleted the last sentence of subsection (c) regarding an initial member serving another term; and in subsection (d) deleted "initial or regular" preceding "member" in the first sentence, and deleted "initial or regular" preceding physician in the second sentence.

Legal Periodicals. —

For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90-4. Board elects officers; quorum.

The North Carolina Medical Board is authorized to elect all officers and adopt all bylaws as may be necessary. A majority of the membership of the Board shall constitute a quorum for the transaction of business. (1858-9, c. 258, s. 11; Code, s. 3128; Rev., s. 4494; C.S., s. 6608; 1981, c. 573, s. 4; 1995, c. 94, s. 7.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners".

§ 90-5. Meetings of Board.

The North Carolina Medical Board shall assemble once in every year in the City of Raleigh, and shall remain in session from day to day until all applicants who may present themselves for examination within the first two days of this meeting have been examined and disposed of; other meetings in each year may be held at some suitable point in the State if deemed advisable. (Rev., s. 4495; 1915, c. 220, s. 1; C.S., s. 6609; 1935, c. 363; 1981, c. 573, s. 5; 1995, c. 94, s. 8.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners".

§ 90-6. Regulations governing applicants for license, examinations, etc.; appointment of subcommittee.

The North Carolina Medical Board is empowered to prescribe such regulations as it may deem proper, governing applicants for license, admission to examinations, the conduct of applicants during examinations, and the conduct of examinations proper.

The North Carolina Medical Board shall appoint and maintain a subcommittee to work jointly with a subcommittee of the Board of Nursing to develop rules and regulations to govern the performance of medical acts by registered nurses, including the determination of reasonable fees to accompany an application for approval not to exceed one hundred dollars ($100.00) and for renewal of approval not to exceed fifty dollars ($50.00). The fee for reactivation of an inactive incomplete application shall be five dollars ($5.00). Rules and regulations developed by this subcommittee from time to time shall govern the performance of medical acts by registered nurses and shall become effective when adopted by both the North Carolina Medical Board and the Board of Nursing. The North Carolina Medical Board shall have responsibility for securing compliance with these regulations. (C.S., s. 6610; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 2; 1973, c. 92, s. 2; 1981, c. 665, s. 1; 1983, c. 53; 1995, c. 94, s. 9; c. 405, s. 2.)

Effect of Amendments. — Session Laws 1995, c. 94, s. 9, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" throughout the section.

Session Laws 1995, c. 405, s. 2, effective October 1, 1995, deleted "such" following "renewal of" in the first sentence of the second paragraph.

§ 90-7. Bond of secretary.

The secretary of the North Carolina Medical Board shall give bond with good surety, to the president of the Board, for the safekeeping and proper payment of all moneys that may come into his hands. (1858-9, c. 258, s. 17; Code, s. 3134; Rev., s. 4497; C.S., s. 6611; 1995, c. 94, s. 10.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners".

§ 90-9. Examination for license; scope; conditions and prerequisites.

It is the duty of the North Carolina Medical Board to examine for license to practice medicine or surgery, or any of the branches thereof, every applicant who complies with the following provisions: the applicant shall, before admittance to examination, satisfy the Board of possession of academic education equal to the entrance requirements of the University of North Carolina, or furnish a certificate from the superintendent of public instruction of the county that the applicant has passed an examination upon literary attainments to meet the requirements of entrance in the regular course of the State University. The applicant shall exhibit a diploma or furnish satisfactory proof of graduation from a medical college or an osteopathic college approved by the American Osteopathic Association at the time of graduation, dated from January 1, 1960, to the present, and whose medical and osteopathic schools shall require an attendance of not less than four years or for a lesser period of time approved by the Board, and supply these facilities for clinical and scientific instruction as meet the approval of the Board. An applicant shall have graduated from a medical college approved by the Liaison Commission on Medical Education or osteopathic college that has been approved by the American Osteopathic Association; or, if graduated from any other medical or osteopathic college, the applicant shall be enrolled in a graduate medical education and training program in North Carolina that has been approved by the Board. An applicant who has graduated from a medical college not approved by the Liaison Commission on Medical Education or osteopathic college that has not been approved by the American Osteopathic Association and who has not enrolled in a graduate medical education and training program in North Carolina which has been approved by the Board shall satisfy the Board that the applicant has successfully completed three years of graduate medical education in a training program approved by the Board. No applicant from a medical or osteopathic college that has been disapproved by the Board is eligible to take the examination.

The examination shall cover the branches of medical science and subjects which the Board considers necessary to determine competence to practice medicine. The Board may divide the examination into parts or components.

The Board shall grant the applicant a license authorizing the applicant to practice medicine in any of its branches if the Board determines that the applicant has successfully passed the examination, is of good moral character, and is:

(1) a graduate of a medical college approved by the Liaison Commission on Medical Education or an osteopathic college approved by the American Osteopathic Association and has successfully completed one year of training in a medical education program approved by the Board after graduation from medical school;

(2) a graduate of a medical college approved by the Liaison Commission on Medical Education or an osteopathic college approved by the American Osteopathic Association, is a dentist licensed to practice dentistry under Article 2 of Chapter 90 of the General Statutes, and has been certified by the American Board of Oral and Maxillofacial Surgery

after having completed a residency in an Oral and Maxillofacial Surgery Residency Program approved by the Board before completion of medical school; or

(3) a graduate of a medical college that has not been approved by the Liaison Commission on Medical Education or an osteopathic college that has not been approved by the American Osteopathic Association and has successfully completed three years of training in a medical education program approved by the Board after graduation from medical school.

Applicants shall be examined by number only; names and other identifying information shall not appear on examination papers. (Rev., s. 4498; 1913, c. 20, ss. 2, 3, 6; C.S., s. 6613; 1921, c. 47, s. 1; 1969, c. 612, s. 1; c. 929, s. 1; 1971, c. 1150, s. 1; 1977, c. 838, s. 1; 1981, c. 573, s. 6; 1985, c. 739, ss. 1-3; 1993, c. 190, s. 1; 1995, c. 94, s. 11.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in the first sentence.

§ 90-11. Qualifications of applicant for license.

Every applicant for a license to practice medicine or for approval to perform medical acts in the State shall satisfy the North Carolina Medical Board that such applicant is of good moral character and meets the other qualifications for the issuance of such a license or for such approval before any such license or approval is granted by the Board to such applicant. (C.S., s. 6615; 1921, c. 47, s. 3; Ex. Sess. 1921, c. 44, s. 5; 1971, c. 1150, s. 3; 1981, c. 573, s. 7; 1995, c. 94, s. 12.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners".

§ 90-12. Limited license; limited volunteer license.

(a) The Board may, whenever in its opinion the conditions of the locality where the applicant resides are such as to render it advisable, make any modifications of the requirements of G.S. 90-9, 90-10, and 90-11 as in its judgment the interests of the people living in that locality may demand, and may issue to the applicant a special license, to be entitled a "Limited License," authorizing the holder of the limited license to practice medicine and surgery within the limits only of the districts specifically described therein. A resident's training license shall expire at the time its holder ceases to be a resident in the training program or obtains any other license to practice medicine issued by the Board. The holder of the limited license practicing medicine or surgery beyond the boundaries of the districts as laid down in said license shall be guilty of a Class 3 misdemeanor, and upon conviction shall only be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each and every offense; and the Board may revoke the limited license, in its discretion, after due notice.

(b) As used in subsection (a) of this section:

(1) "Limited license" includes a resident's training license.

(2) "Resident training license" means a license to practice in a medical education and training program, approved by the Board, for the purpose of education or training.

(c) The Board shall issue to an applicant a special license to be entitled a "Limited Volunteer License," authorizing the holder of the limited license to practice medicine and surgery only at clinics which specialize in the treatment of indigent patients. The holder of a limited license issued pursuant to this subsection may not receive compensation for services rendered at clinics specializing in the care of indigent patients. The Board shall issue a limited license under this subsection to an applicant who:

(1) Has a license to practice medicine and surgery in another state;
(2) Produces a letter from the state of licensure indicating the applicant is in good standing; and
(3) Is authorized to treat personnel enlisted in the United States armed services or veterans.

The Board shall issue a limited license under this subsection within 30 days after an applicant provides the Board with information satisfying the requirements of this subsection.

The holder of a limited license issued pursuant to this subsection who practices medicine or surgery at places other than clinics which specialize in the treatment of indigent patients shall be guilty of a Class 3 misdemeanor and, upon conviction, shall only be fined not less than twenty-five dollars ($25.00) nor more than fifty dollars ($50.00) for each and every offense; and the Board may revoke the limited license, in its discretion, after due notice. (1909, c. 218, s. 1; C.S., s. 6616; 1967, c. 691, s. 42; 1981, c. 573, s. 8; 1993, c. 539, s. 614; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 405, s. 3; 1995 (Reg. Sess., 1996), c. 634, s. 2.)

Editor's Note. — Session Laws 1993, c. 539, s. 614, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the subsection (a) designation; in subsection (a) substituted "of the limited license" for "thereof" in the first sentence; added the second sentence, substituted "may revoke the" for "is empowered to revoke such" in the last sentence; added subsection (b); and made stylistic changes.

The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, added "limited volunteer license" to the end of the catchline and made a related change; substituted "subsection (a) of this section" for "this section" following "As used in" in subsection (b); and added subsection (c).

§ 90-13. When license without examination allowed.

The North Carolina Medical Board shall in their discretion issue a license to any applicant to practice medicine and surgery in this State without examination if said applicant exhibits a diploma or satisfactory proof of graduation from a medical or osteopathic college, approved as provided in G.S. 90-9 and requiring an attendance of not less than four years or for such lesser period of time approved by the Board, and a license issued to him to practice medicine and surgery by the Board of Medical Examiners of another state, and has successfully completed one year of training after his graduation from medical college in a medical education and training program approved by the Board, in which program the Board may permit him to practice medicine. An applicant for licensing under this section who was graduated from a medical college not approved by the Liaison Commission on Medical Education or osteopathic college that has not been approved by the American Osteopathic Association shall have successfully completed three years of training in a medical education and training program approved by the Board after graduation. The Board may grant a license under this section for any period of time and with any conditions it deems appropriate. No license may be granted to any applicant who was graduated from a medical or osteopathic college which has been disapproved by the Board. (1907, c. 890; 1913, c. 20, s. 3; C.S., s. 6617; 1969, c. 612, s. 3; 1971, c. 1150, s. 4; 1975, c. 690, s. 3; 1977, c. 838, s. 2; 1985, c. 739, s. 4; 1995, c. 94, s. 13.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in the first sentence.

§ 90-14. Revocation, suspension, annulment or denial of license.

(a) The Board shall have the power to deny, annul, suspend, or revoke a license, or other authority to practice medicine in this State, issued by the Board to any person who has been found by the Board to have committed any of the following acts or conduct, or for any of the following reasons:

(1) Immoral or dishonorable conduct.
(2) Producing or attempting to produce an abortion contrary to law.
(3) Made false statements or representations to the Board, or who has willfully concealed from the Board material information in connection with his application for a license.
(4) Repealed by Session Laws 1977, c. 838, s. 3.
(5) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness, drunkenness, excessive use of alcohol, drugs, chemicals, or any other type of material or by reason of any physical or mental abnormality. The Board is empowered and authorized to require a physician licensed by it to submit to a mental or physical examination by physicians designated by the Board before or after charges may be presented against him, and the results of examination shall be admissible in evidence in a hearing before the Board.
(6) Unprofessional conduct, including, but not limited to, departure from, or the failure to conform to, the standards of acceptable and prevailing medical practice, or the ethics of the medical profession, irrespective of whether or not a patient is injured thereby, or the committing of any act contrary to honesty, justice, or good morals, whether the same is committed in the course of his practice or otherwise, and whether committed within or without North Carolina. The Board shall not revoke the license of or deny

a license to a person solely because of that person's practice of a therapy that is experimental, nontraditional, or that departs from acceptable and prevailing medical practices unless, by competent evidence, the Board can establish that the treatment has a safety risk greater than the prevailing treatment or that the treatment is generally not effective.

(7) Conviction in any court of a crime involving moral turpitude, or the violation of a law involving the practice of medicine, or a conviction of a felony; provided that a felony conviction shall be treated as provided in subsection (c) of this section.

(8) By false representations has obtained or attempted to obtain practice, money or anything of value.

(9) Has advertised or publicly professed to treat human ailments under a system or school of treatment or practice other than that for which he has been educated.

(10) Adjudication of mental incompetency, which shall automatically suspend a license unless the Board orders otherwise.

(11) Lack of professional competence to practice medicine with a reasonable degree of skill and safety for patients. In this connection the Board may consider repeated acts of a physician indicating his failure to properly treat a patient. The Board may, upon reasonable grounds, require a physician to submit to inquiries or examinations, written or oral, by members of the Board or by other physicians licensed to practice medicine in this State, as the Board deems necessary to determine the professional qualifications of such licensee.

(12) Promotion of the sale of drugs, devices, appliances or goods for a patient, or providing services to a patient, in such a manner as to exploit the patient, and upon a finding of the exploitation, the Board may order restitution be made to the payer of the bill, whether the patient or the insurer, by the physician; provided that a determination of the amount of restitution shall be based on credible testimony in the record.

(13) Having a license to practice medicine or the authority to practice medicine revoked, suspended, restricted, or acted against or having a license to practice medicine denied by the licensing authority of any jurisdiction. For purposes of this subdivision, the licensing authority's acceptance of a license to practice medicine voluntarily relinquished by a physician or relinquished by stipulation, consent order, or other settlement in response to or in anticipation of the filing of administrative charges against the physician's license, is an action against a license to practice medicine.

(14) The failure to respond, within a reasonable period of time and in a reasonable manner as determined by the Board, to inquiries from the Board concerning any matter affecting the license to practice medicine.

For any of the foregoing reasons, the Board may deny the issuance of a license to an applicant or revoke a license issued to him, may suspend such a license for a period of time, and may impose conditions upon the continued practice after such period of suspension as the Board may deem advisable, may limit the accused physician's practice of medicine with respect to the extent, nature or location of his practice as the Board deems advisable. The Board may, in its discretion and upon such terms and conditions and for such period of time as it may prescribe, restore a license so revoked or rescinded, except that no license that has been revoked shall be restored for a period of two years following the date of revocation.

(b) The Board shall refer to the State Medical Society Physician Health and Effectiveness Committee all physicians whose health and effectiveness have been significantly impaired by alcohol, drug addiction or mental illness.

(c) A felony conviction shall result in the automatic revocation of a license issued by the Board, unless the Board orders otherwise or receives a request for a hearing from the person within 60 days of receiving notice from the Board, after the conviction, of the provisions of this subsection. If the Board receives a timely request for a hearing in such a case, the provisions of G.S. 90-14.2 shall be followed.

(d) The Board and its members and staff may release confidential or nonpublic information to any health care licensure board in this State or another state about the issuance, denial, annulment, suspension, or revocation of a license, or the voluntary surrender of a license by a Board-licensed physician, including the reasons for the action, or an investigative report made by the Board. The Board shall notify the physician within 60 days after the information is transmitted. A summary of the information that is being transmitted shall be furnished to the physician. If the physician requests, in writing, within 30 days after being notified that such information has been transmitted, he shall be furnished a copy of all information so transmitted. The notice or copies of the information shall not be provided if the information relates to an ongoing criminal investigation by any law-enforcement agency, or authorized Department of Human Resources personnel with enforcement or investigative responsibilities.

(e) The Board and its members and staff shall not be held liable in any civil or criminal proceeding for exercising, in good faith, the powers and duties authorized by law. (C.S., s. 6618; 1921, c. 47, s. 4; Ex. Sess. 1921, c. 44, s. 6; 1933, c. 32; 1953, c. 1248, s. 2; 1969, c. 612, s. 4; c. 929, s. 6; 1975, c. 690, s. 4; 1977, c. 838, s. 3; 1981, c. 573, ss. 9, 10; 1987, c. 859, ss. 6-10; 1993, c. 241, s. 1; 1995, c. 405, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subdivision (a)(11) divided the former second sentence into the present second and third sentences, deleted "and may" from the end of the present second sentence, and added "The Board may, upon reasonable grounds" in the third sentence; in subdivision (a)(12) deleted "for financial gain of a physician" following "exploit the patient", and deleted "for financial gain" following "exploitation"; rewrote subdivision (a)(13); and added "except that no license that has been revoked shall be restored for a period of two years following the date of revocation" to the end of the last sentence in subsection (a).

§ 90-14.1. Judicial review of Board's decision denying issuance of a license.

Whenever the North Carolina Medical Board has determined that a person who has duly made application to take an examination to be given by the Board showing his education, training and other qualifications required by said Board, or that a person who has taken and passed an examination given by the Board, has failed to satisfy the Board of his qualifications to be examined or to be issued a license, for any cause other than failure to pass an examination, the Board shall immediately notify such person of its decision, and indicate in what respect the applicant has so failed to satisfy the Board. Such applicant shall be given a formal hearing before the Board upon request of such applicant filed with or mailed by registered mail to the secretary of the Board at Raleigh, North Carolina, within 10 days after receipt of the Board's decision, stating the reasons for such request. The Board shall within 20 days of receipt of such request notify such applicant of the time and place of a public hearing, which shall be held within a reasonable time. The burden of satisfying the Board of his qualifications for licensure shall be upon the applicant. Following such hearing, the Board shall determine whether the applicant is qualified to be examined or is entitled to be licensed as the case may be. Any such decision of the Board shall be subject to judicial review upon appeal to the Superior Court of Wake County upon the filing with the Board of a written notice of appeal with exceptions taken to the decision of the Board within 20 days after service of notice of the Board's final decision. Within 30 days after receipt of notice of appeal, the secretary of the Board shall certify to the clerk of the Superior Court of Wake County the record of the case which shall include a copy of the notice of hearing, a transcript of the testimony and evidence received at the hearing, a copy of the decision of the Board, and a copy of the notice of appeal and exceptions. Upon appeal the case shall be heard by the judge without a jury, upon the record, except that in cases of alleged omissions or errors in the record, testimony may be taken by the court. The decision of the Board shall be upheld unless the substantial rights of the applicant have been prejudiced because the decision of the Board is in violation of law or is not supported by any evidence admissible under this Article, or is arbitrary or capricious. Each party to the review proceeding may appeal to the Supreme Court as hereinafter provided in G.S. 90-14.11. (1953, c. 1248, s. 3; 1995, c. 94, s. 14.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in the first sentence.

§ 90-14.3. Service of notices.

Any notice required by this Chapter may be served either personally or by an officer authorized by law to serve process, or by registered or certified mail, return receipt requested, directed to the licensee or applicant at his last known address as shown by the records of the Board. If notice is served personally, it shall be deemed to have been served at the time when the officer delivers the notice to the person addressed. Where notice is served by registered or certified mail, it shall be deemed to have been served on the date borne by the return receipt showing delivery of the notice to the addressee, showing refusal of the addressee to accept the notice, or showing failure to locate the addressee at the last known address as shown by the records of the Board. (1953, c. 1248, s. 3; 1995, c. 405, s. 5.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added "or certified" in the first sentence, and in the third sentence added "or certified", substituted "the addressee, showing" for "addressee or", and added "or showing failure to locate the addressee at the last known address as shown by the records of the Board".

§ 90-14.9. Appeal bond; stay of Board order.

(a) The person seeking the review shall file with the clerk of the reviewing court a copy of the notice of appeal and an appeal bond of two hundred dollars ($200.00) at the same time the notice of appeal is filed with the Board. Subject to subsection (b) of this section, at any time before or during the review proceeding the aggrieved person may apply to the reviewing court for an order staying the operation of the Board decision pending the outcome of the review, which the court may grant or deny in its discretion.

(b) No stay shall be granted under this section unless the Board is given prior notice and an opportunity to be heard in response to the application for an order staying the operation of the Board decision. (1953, c. 1248, s. 3; 1995, c. 405, s. 6.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the subsection (a) designation; added "Subject to subsection (b) of this section" in the second sentence of subsection (a); and added subsection (b).

§ 90-14.11. Appeal; appeal bond.

(a) Any party to the review proceeding, including the Board, may appeal from the decision of the superior court under rules of procedure applicable in other civil cases. No appeal bond shall be required of the Board. Subject to subsection (b) of this section, the appealing party may apply to the superior court for a stay of that court's decision or a stay of the Board's decision, whichever shall be appropriate, pending the outcome of the appeal.

(b) No stay shall be granted unless all parties are given prior notice and an opportunity to be heard in response to the application for an order staying the operation of the Board decision. (1953, c. 1248, s. 3; 1989, c. 770, s. 75.1; 1995, c. 405, s. 7.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the subsection (a) designation; added "Subject to subsection (b) of this section" in the third sentence of subsection (a); and added subsection (b).

§ 90-14.13. Reports of disciplinary action by health care institutions; immunity from liability.

The chief administrative officer of every licensed hospital or other health care institution, including Health Maintenance Organizations, as defined in G.S. 58-67-5, preferred providers, as defined in G.S. 58-50-50, and all other provider organizations that issue credentials to physicians who practice medicine in the State, shall, after consultation with the chief of staff of such institution, report to the Board any revocation, suspension, or limitation of a physician's privileges to practice in that institution. Each such institution shall also report to the Board resignations from practice in that institution by persons licensed under this Article. The Board shall report all violations of this subsection known to it to the licensing agency for the institution involved.

Any licensed physician who does not possess professional liability insurance shall report to the Board any award of damages or any settlement of any malpractice complaint affecting his or her practice within 30 days of the award or settlement.

The chief administrative officer of each insurance company providing professional liability insurance for physicians who practice medicine in North Carolina, the administrative officer of the Liability Insurance Trust Fund Council created by G.S. 116-220, and the administrative officer of any trust fund operated by a hospital authority, group, or provider shall report to the Board within 30 days:

(1) Any award of damages or settlement affecting or involving a physician it insures, or

(2) Any cancellation or nonrenewal of its professional liability coverage of a physician, if the cancellation or nonrenewal was for cause.

The Board may request details about any action and the officers shall promptly furnish the requested information. The reports required by this section are privileged and shall not be open to the public. The Board shall report all violations of this paragraph to the Commissioner of Insurance.

Any person making a report required by this section shall be immune from any criminal prosecution or civil liability resulting therefrom unless such person knew the report was false or acted in reckless disregard of whether the report was false. (1981, c. 573, s. 14; 1987, c. 859, s. 11; 1995, c. 405, s. 8.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added "including Health Maintenance Organizations, as defined in G.S. 58-67-5, preferred providers, as defined in G.S. 58-50-50, and all other provider organizations that issue credentials to physicians who practice medicine" in the first sentence of the first paragraph, added the second paragraph, and made a punctuation change.

§ 90-15. License fee; salaries, fees, and expenses of Board.

Each applicant for a license by examination shall pay to the North Carolina Medical Board a fee which shall be prescribed by the Board in an amount not exceeding the sum of four hundred dollars ($400.00) plus the cost of test materials before being admitted to the examination. Whenever a license is granted without examination, as authorized in G.S. 90-13, the applicant shall pay to the Board a fee in an amount to be prescribed by the Board not in excess of two hundred fifty dollars ($250.00). Whenever a limited license is granted as provided in G.S. 90-12, the applicant shall pay to the Board a fee not to exceed one hundred fifty dollars ($150.00), except where a limited license to practice in a medical education and training program approved by the Board for the purpose of education or training is granted, the applicant shall pay a fee of twenty-five dollars ($25.00). A fee of twenty-five dollars ($25.00) shall be paid for the issuance of a duplicate license. All fees shall be paid in advance to the North Carolina Medical Board, to be held in a fund for the use of the Board. The compensation and expenses of the members and officers of the Board and all expenses proper and necessary in the opinion of the Board to the discharge of its duties under and to enforce the laws regulating the practice of medicine or surgery shall be paid out of the fund, upon the warrant of the Board. The per diem compensation of Board members shall not exceed two hundred dollars ($200.00) per day per member for time spent in the performance and discharge of duties as a member. Any unexpended sum or sums of money remaining in the treasury of the Board at the expiration of the terms of office of the members of the Board shall be paid over to their successors in office.

For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount. (1858-9, c. 258, s. 13; Code, s. 3130; Rev., s. 4501; 1913, c. 20, ss. 4, 5; C.S., s. 6619; 1921, c. 47, s. 5; Ex. Sess. 1921, c. 44, s. 7; 1953, c. 187; 1969, c. 929, s. 4; 1971, c. 817, s. 2; c. 1150, s. 5; 1977, c. 838, s. 4; 1979, c. 196, s. 1; 1981, c. 573, s. 15; 1983 (Reg. Sess., 1984), c. 1063, s. 1; 1985, c. 362, ss. 1-3; 1987, c. 859, ss. 13, 14; 1993 (Reg. Sess., 1994), c. 566, s. 2; 1995, c. 94, s. 15; c. 509, s. 37.)

Effect of Amendments. — Session Laws 1995, c. 94, s. 15, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners of the State of North Carolina" in the first and fifth sentences.

Session Laws 1995, c. 509, s. 37, effective July 29, 1995, deleted "the" preceding "the Board and all expenses" in the sixth sentence.

§ 90-15.1. (Effective until January 1, 1998.) Registration every two years with Board.

Every person licensed to practice medicine by the North Carolina Medical Board shall, during the month of January in every odd-numbered year, register with the Board. A person who registers with the Board shall report to the Board the person's name and office and residence address and any other information required by the Board, and shall pay a registration fee fixed by the Board not in excess of two hundred dollars ($200.00). A physician who fails to register when required shall pay an additional fee of twenty dollars ($20.00) to the Board. Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board. Upon payment of all fees and penalties which are due, the license of the physician may be reinstated, subject to the Board requiring the physician to appear before the Board for an interview and to comply with other licensing requirements. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2; 1983 (Reg. Sess., 1984), c. 1063, s. 2; 1987, c. 859, s. 12; 1993 (Reg. Sess., 1994), c. 566, s. 1; 1995, c. 94, s. 16.)

Section Set Out Twice. — The section above is effective until January 1, 1998. For the section as amended effective January 1, 1998, see the following section, also numbered § 90-15.1.

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in the first sentence.

§ 90-15.1. (Effective January 1, 1998.) Registration every year with Board.

Every person licensed to practice medicine by the North Carolina Medical Board shall, prior to January 31 of each year, register with the Board. A person who registers with the Board shall report to the Board the person's name and office and residence address and any other information required by the Board, and shall pay a registration fee fixed by the Board not in excess of one hundred dollars ($100.00). For purposes of annual registration, the Board shall use a simplified registration form which allows registrants to confirm information on file with the Board. A physician who fails to register by January 31 shall pay an additional fee of twenty dollars ($20.00) to the Board. The license of any physician who fails to register and said failure continues for a period of 30 days after certified notice of said failure, is automatically suspended. Upon payment of all accumulated fees and penalties, the license of the physician may be reinstated, subject to the Board requiring the physician to appear before the Board for an interview and to comply with other licensing requirements. (1957, c. 597; 1969, c. 929, s. 5; 1979, c. 196, s. 2; 1983 (Reg. Sess., 1984), c. 1063, s. 2; 1987, c. 859, s. 12; 1993 (Reg. Sess., 1994), c. 566, s. 1; 1995, c. 94, s. 16; 1995 (Reg. Sess., 1996), c. 634, s. 1(a).)

Section Set Out Twice. — The section above is effective January 1, 1998. For the section as in effect until January 1, 1998, see the preceding section, also numbered § 90-15.1.

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 634, s. 1(b), provides that notwithstanding any other provision of law, the 1997 registration fee fixed by the Board pursuant to G.S. 90-15.1 shall not exceed one hundred dollars ($100.00).

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective January 1, 1998, substituted "year" for "two years" in the catchline; substituted "prior to January 31 of each year" for "during the month of January in every odd-numbered year" in the first sentence; substituted "one hundred dollars ($100.00)" for "two hundred dollars ($200.00)" in the second sentence; inserted the present third sentence; substituted "by January 31" for "when required" in the present fourth sentence; deleted the former fourth sentence, which read "Should a physician fail to register and pay the fees imposed, and should such failure continue for a period of 30 days, the license of such physician may be suspended by the Board, after notice and hearing at the next regular meeting of the Board"; inserted the present fifth sentence; and in the present sixth sentence, inserted "accumulated" following "payment of all", and deleted "which are due" following "fees and penalties".

§ 90-16. Board to keep record; publication of names of licentiates; transcript as evidence; receipt of evidence concerning treatment of patient who has not consented to public disclosure.

The North Carolina Medical Board shall keep a regular record of its proceedings in a book kept for that purpose, together with the names of the members of the Board present, the names of the applicants for license, and other information as to its actions. The North Carolina Medical Board shall cause to be entered in a separate book the name of each applicant to whom a license is issued to practice medicine or surgery, along with any information pertinent to such issuance. The North Carolina Medical Board shall publish the names of those licensed in three daily newspapers published in the State of North Carolina, within 30 days after granting the same. A transcript of any such entry in the record books, or certificate that there is not entered therein the name and proficiency or date of granting such license of a person charged with the violation of the provisions of this Article, certified under the hand of the secretary and the seals of the Board of Medical Examiners of the State of North Carolina, shall be admitted as evidence in any court of this State when it is otherwise competent.

The Board may in a closed session receive evidence involving or concerning the treatment of a patient who has not expressly or impliedly consented to the public disclosure of such treatment as may be necessary for the protection of the rights of such patient or of the accused physician and the full presentation of relevant evidence. All records, papers and other documents containing information collected and compiled by the Board, or its members or employees as a result of investigations, inquiries or interviews conducted in connection with a licensing or disciplinary matter shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any such investigation, inquiry or interview; and provided, further, that if any such record, paper or other document containing information theretofore collected and compiled by the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes.

In any proceeding before the Board, in any record of any hearing before the Board, and in the notice of the charges against any licensee (notwithstanding any provision herein to the contrary) the Board may withhold from public disclosure the identity of a patient who has not expressly or impliedly consented to the public disclosure of treatment by the accused physician. (1858-9, c. 258, s. 12; Code, s. 3129; Rev., s. 4500; C.S., s. 6620; 1921, c. 47, s. 6; 1977, c. 838, s. 5; 1993 (Reg. Sess., 1994), c. 570, s. 6; 1995, c. 94, s. 17.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" three times in the first paragraph.

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

§ 90-18. Practicing without license; practicing defined; penalties.

No person shall practice medicine or surgery, or any of the branches thereof, nor in any case prescribe for the cure of diseases unless he shall have been first licensed and registered so to do in the manner provided in this Article, and if any person shall practice medicine or surgery without being duly licensed and registered, as provided in this Article, he shall not be allowed to maintain any action to collect any fee for such services. The person so practicing without license shall be guilty of a Class 1 misdemeanor.

Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited:

(1) The administration of domestic or family remedies in cases of emergency.

(2) The practice of dentistry by any legally licensed dentist engaged in the practice of dentistry and dental surgery.

(3) The practice of pharmacy by any legally licensed pharmacist engaged in the practice of pharmacy.

(4) The practice of medicine and surgery by any surgeon or physician of the United States army, navy, or public health service in the discharge of his official duties.

(5) The treatment of the sick or suffering by mental or spiritual means without the use of any drugs or other material means.

(6) The practice of optometry by any legally licensed optometrist engaged in the practice of optometry.

(7) The practice of midwifery as defined in G.S. 90-178.2.

(8) The practice of chiropody by any legally licensed chiropodist when engaged in the practice of chiropody, and without the use of any drug.

(9) The practice of osteopathy by any legally licensed osteopath when engaged in the practice of osteopathy as defined by law, and especially G.S. 90-129.

(10) The practice of chiropractic by any legally licensed chiropractor when engaged in the practice of chiropractic as defined by law, and without the use of any drug or surgery.

(11) The practice of medicine or surgery by any reputable physician or surgeon in a neighboring state coming into this State for consultation with a resident registered physician. This proviso shall not apply to physicians resident in a neighboring state and regularly practicing in this State.

(12) Any person practicing radiology as hereinafter defined shall be deemed to be engaged in the practice of medicine within the meaning of this Article. "Radiology" shall be defined as, that method of medical practice in which demonstration and examination of the normal and abnormal structures, parts or functions of the human body are made by use of X ray. Any person shall be regarded as engaged in the practice of radiology who makes or offers to make, for a consideration, a demonstration or examination of a human being or a part or parts of a human body by means of fluoroscopic exhibition or by the shadow imagery registered with photographic materials and the use of X rays; or holds himself out to diagnose or able to make or makes any interpretation or explanation by word of mouth, writing or otherwise of the meaning of such fluoroscopic or registered shadow imagery of any part of the human body by use of X rays; or who treats any disease or condition of the human body by the application of X rays or radium. Nothing in this

subdivision shall prevent the practice of radiology by any person licensed under the provisions of Articles 2, 7, 8, and 12A of this Chapter.

(13) Any act, task or function performed by an assistant to a person licensed as a physician by the North Carolina Medical Board when

a. Such assistant is approved by and annually registered with the Board as one qualified by training or experience to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and

b. Such act, task or function is performed at the direction or under the supervision of such physician, in accordance with rules and regulations promulgated by the Board, and

c. The services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved and registered;

Provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom.

(14) The practice of nursing by a registered nurse engaged in the practice of nursing and the performance of acts otherwise constituting medical practice by a registered nurse when performed in accordance with rules and regulations developed by a joint subcommittee of the North Carolina Medical Board and the Board of Nursing and adopted by both boards.

(15) The practice of dietetics/nutrition by a licensed dietitian/nutritionist under the provisions of Article 25 of this Chapter.

(16) The practice of acupuncture by a licensed acupuncturist in accordance with the provisions of Article 30 of this Chapter. (1858-9, c. 258, s. 2; Code, s. 3122; 1885, c. 117, s. 2; c. 261; 1889, c. 181, ss. 1, 2; Rev., ss. 3645, 4502; C.S., s. 6622; 1921, c. 47, s. 7; Ex. Sess. 1921, c. 44, s. 8; 1941, c. 163; 1967, c. 263, s. 1; 1969, c. 612, s. 5; c. 929, s. 3; 1971, c. 817, s. 1; c. 1150, s. 6; 1973, c. 92, s. 1; 1983, c. 897, s. 2; 1993, c. 303, s. 2; c. 539, s. 615; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 94, ss. 18, 19.)

Editor's Note. —

Session Laws 1993, c. 539, s. 615, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — Session Laws 1995, c. 94, ss. 18 and 19, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in subdivisions (13) and (14).

§ 90-18.1. Limitations on physician assistants.

(a) Any person who is approved under the provisions of G.S. 90-18(13) to perform medical acts, tasks or functions as an assistant to a physician may use the title "physician assistant." Any other person who uses the title in any form or holds out to be a physician assistant or to be so approved, shall be deemed to be in violation of this Article.

(b) Physician assistants are authorized to write prescriptions for drugs under the following conditions:

(1) The North Carolina Medical Board has adopted regulations governing the approval of individual physician assistants to write prescriptions with such limitations as the Board may determine to be in the best interest of patient health and safety;

(2) The physician assistant has current approval from the Board;

(3) The North Carolina Medical Board has assigned an identification number to the physician assistant which is shown on the written prescription; and

(4) The supervising physician has provided to the physician assistant written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Physician assistants are authorized to compound and dispense drugs under the following conditions:

(1) The function is performed under the supervision of a licensed pharmacist; and

(2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(d) Physician assistants are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:

(1) The North Carolina Medical Board has adopted regulations governing the approval of individual physician assistants to order medications, tests and treatments with such limitations as the Board may determine to be in the best interest of patient health and safety;

(2) The physician assistant has current approval from the Board;

(3) The supervising physician has provided to the physician assistant written instructions about ordering medications, tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test or treatment is ordered; and

(4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the physician assistants' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a physician assistant or order given by a physician assistant for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the Board as the supervisor of the physician assistant and such supervising physician shall be responsible for authorizing such prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a physician assistant for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1975, c. 627; 1977, c. 904, s. 1; 1977, 2nd Sess., c. 1194, s. 1; 1995, c. 94, s. 20.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" throughout the section.

§ 90-18.2. Limitations on nurse practitioners.

(a) Any nurse approved under the provisions of G.S. 90-18(14) to perform medical acts, tasks or functions may use the title "nurse practitioner." Any other person who uses the title in any form or holds out to be a nurse practitioner or to be so approved, shall be deemed to be in violation of this Article.

(b) Nurse practitioners are authorized to write prescriptions for drugs under the following conditions:

(1) The North Carolina Medical Board and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to write prescriptions with such limitations as the boards may determine to be in the best interest of patient health and safety;

(2) The nurse practitioner has current approval from the boards;

(3) The North Carolina Medical Board has assigned an identification number to the nurse practitioner which is shown on the written prescription; and

(4) The supervising physician has provided to the nurse practitioner written instructions about indications and contraindications for prescribing drugs and a written policy for periodic review by the physician of the drugs prescribed.

(c) Nurse practitioners are authorized to compound and dispense drugs under the following conditions:

(1) The function is performed under the supervision of a licensed pharmacist; and

(2) Rules and regulations of the North Carolina Board of Pharmacy governing this function are complied with.

(d) Nurse practitioners are authorized to order medications, tests and treatments in hospitals, clinics, nursing homes and other health facilities under the following conditions:

(1) The North Carolina Medical Board and Board of Nursing have adopted regulations developed by a joint subcommittee governing the approval of individual nurse practitioners to order medications, tests and treatments with such limitations as the boards may determine to be in the best interest of patient health and safety;

(2) The nurse practitioner has current approval from the boards;

(3) The supervising physician has provided to the nurse practitioner written instructions about ordering medications,

tests and treatments, and when appropriate, specific oral or written instructions for an individual patient, with provision for review by the physician of the order within a reasonable time, as determined by the Board, after the medication, test or treatment is ordered; and

(4) The hospital or other health facility has adopted a written policy, approved by the medical staff after consultation with the nursing administration, about ordering medications, tests and treatments, including procedures for verification of the nurse practitioners' orders by nurses and other facility employees and such other procedures as are in the interest of patient health and safety.

(e) Any prescription written by a nurse practitioner or order given by a nurse practitioner for medications, tests or treatments shall be deemed to have been authorized by the physician approved by the boards as the supervisor of the nurse practitioner and such supervising physician shall be responsible for authorizing such prescription or order.

(f) Any registered nurse or licensed practical nurse who receives an order from a nurse practitioner for medications, tests or treatments is authorized to perform that order in the same manner as if it were received from a licensed physician. (1977, 2nd Sess., c. 1194, s. 2; 1995, c. 94, s. 21.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" throughout the section.

§ 90-21. Certain offenses prosecuted in superior court; duties of Attorney General.

In case of the violation of the criminal provisions of G.S. 90-18, the Attorney General of the State of North Carolina, upon complaint of the North Carolina Medical Board, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the district attorney of the district in which the offense was committed to institute a criminal action against the offending persons. A district attorney's fee of five dollars ($5.00) shall be allowed and collected in accordance with the provisions of G.S. 6-12. The North Carolina Medical Board may also employ, at their own expense, special counsel to assist the Attorney General or the district attorney.

Exclusive original jurisdiction of all criminal actions instituted for the violations of G.S. 90-18 shall be in the superior court, the provisions of any special or local act to the contrary notwithstanding. (1915, c. 220, s. 2; C.S., s. 6625; 1973, c. 47, s. 2; 1981, c. 573, s. 16; 1995, c. 94, s. 22.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, in the first paragraph substituted "North Carolina Medical Board" for "Board of Medical Examiners of the State of North Carolina" in the first sentence, and substituted "North Carolina Medical Board" for "Board of Medical Examiners" in the last sentence.

ARTICLE 1A.

Treatment of Minors.

Part 1. General Provisions.

Editor's Note. — Sections 90-21.1 to 90-21.5 have been designated as Part 1 of Article 1A by Session Laws 1995, c. 462, s. 1.

Part 2. Parental or Judicial Consent for Abortion.

§ 90-21.6. Definitions.

For the purposes of Part 2 only of this Article, unless the context clearly requires otherwise:

(1) "Unemancipated minor" or "minor" means any person under the age of 18 who has not been married or has not been emancipated pursuant to Article 56 of Chapter 7A of the General Statutes.

(2) "Abortion" means the use or prescription of any instrument, medicine, drug, or any other substance or device with intent to terminate the pregnancy of a woman known to be pregnant, for reasons other than to save the life or preserve the health of an unborn child, to remove a dead unborn child, or to deliver an unborn child prematurely, by accepted medical procedures in order to preserve the health of both the mother and the unborn child. (1995, c. 462, s. 1.)

Cross References. — Session Laws 1995, c. 462, s. 5 is codified at § 108A-28.1.

Editor's Note. — Session Laws 1995, c. 462, s. 6, made Part 2 effective October 1, 1995.

§ 90-21.7. Parental consent required.

(a) No physician licensed to practice medicine in North Carolina shall perform an abortion upon an unemancipated minor unless the physician or agent thereof or another physician or agent thereof first obtains the written consent of the minor and of:

(1) A parent with custody of the minor; or

(2) The legal guardian or legal custodian of the minor; or

(3) A parent with whom the minor is living; or

(4) A grandparent with whom the minor has been living for at least six months immediately preceding the date of the minor's written consent.

(b) The pregnant minor may petition, on her own behalf or by guardian ad litem, the district court judge assigned to the juvenile proceedings in the district court where the minor resides or where she is physically present for a waiver of the parental consent requirement if:

(1) None of the persons from whom consent must be obtained pursuant to this section is available to the physician performing the abortion or the physician's agent or the referring physician or the agent thereof within a reasonable time or manner; or

(2) All of the persons from whom consent must be obtained pursuant to this section refuse to consent to the performance of an abortion; or

(3) The minor elects not to seek consent of the person from whom consent is required. (1995, c. 462, s. 1.)

§ 90-21.8. Procedure for waiver of parental consent.

(a) The requirements and procedures under Part 2 of this Article are available and apply to unemancipated minors seeking treatment in this State.

(b) The court shall ensure that the minor or her guardian ad litem is given assistance in preparing and filing the petition and shall ensure that the minor's identity is kept confidential.

(c) The minor may participate in proceedings in the court on her own behalf or through a guardian ad litem. The court shall advise her that she has a right to court appointed counsel and shall provide her with counsel upon her request.

(d) Court proceedings under this section shall be confidential and shall be given precedence over other pending matters necessary to ensure that the court may reach a decision promptly. In no case shall the court fail to rule within seven days of the time of filing the application. This time limitation may be extended at the request of the minor. At the hearing, the court shall hear evidence relating to the emotional development, maturity, intellect, and understanding of the minor; the nature, possible consequences, and alternatives to the abortion; and any other evidence that the court may find useful in determining whether the parental consent requirement shall be waived.

(e) The parental consent requirement shall be waived if the court finds:

(1) That the minor is mature and well-informed enough to make the abortion decision on her own; or

(2) That it would be in the minor's best interests that parental consent not be required; or

(3) That the minor is a victim of rape or of felonious incest under G.S. 14-178.

(f) The court shall make written findings of fact and conclusions of law supporting its decision and shall order that a confidential record of the evidence be maintained. If the court finds that the minor has been a victim of incest, whether felonious or misdemeanor, it shall advise the Director of the Department of Social Services of its findings for further action pursuant to Article 44 of Chapter 7A of the General Statutes.

(g) If the female petitioner so requests in her petition, no summons or other notice may be served upon the parents, guardian, or custodian of the minor female.

(h) The minor may appeal an order issued in accordance with this section. The appeal shall be a de novo hearing in superior court. The notice of appeal shall be filed within 24 hours from the date of issuance of the district court order. The de novo hearing may be held out of district and out of session and shall be held as soon as possible within seven days of the filing of the notice of appeal. The record of the de novo hearing is a confidential record and shall not be open for general public inspection. The Chief Justice of the North Carolina

Supreme Court shall adopt rules necessary to implement this subsection.

(i) No court costs shall be required of any minor who avails herself of the procedures provided by this section. (1995, c. 462, s. 1.)

§ 90-21.9. Medical emergency exception.

The requirements of parental consent prescribed by G.S. 90-21.7(a) shall not apply when, in the best medical judgment of the physician based on the facts of the case before the physician, a medical emergency exists that so complicates the pregnancy as to require an immediate abortion, or when the conditions prescribed by G.S. 90-21.1(4) are met. (1995, c. 462, s. 1.)

§ 90-21.10. Penalty.

Any person who intentionally performs an abortion with knowledge that, or with reckless disregard as to whether, the person upon whom the abortion is to be performed is an unemancipated minor, and who intentionally or knowingly fails to conform to any requirement of Part 2 of this Article shall be guilty of a Class 1 misdemeanor. (1995, c. 462, s. 1.)

ARTICLE 1B.

Medical Malpractice Actions.

§ 90-21.11. Definitions.

As used in this Article, the term "health care provider" means without limitation any person who pursuant to the provisions of Chapter 90 of the General Statutes is licensed, or is otherwise registered or certified to engage in the practice of or otherwise performs duties associated with any of the following: medicine, surgery, dentistry, pharmacy, optometry, midwifery, osteopathy, podiatry, chiropractic, radiology, nursing, physiotherapy, pathology, anesthesiology, anesthesia, laboratory analysis, rendering assistance to a physician, dental hygiene, psychiatry, psychology; or a hospital or a nursing home; or any other person who is legally responsible for the negligence of such person, hospital or nursing home; or any other person acting at the direction or under the supervision of any of the foregoing persons, hospital, or nursing home.

As used in this Article, the term "medical malpractice action" means a civil action for damages for personal injury or death arising out of the furnishing or failure to furnish professional services in the performance of medical, dental, or other health care by a health care provider. (1975, 2nd Sess., c. 977, s. 4; 1987, c. 859, s. 1; 1995, c. 509, s. 135.2(o).)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "or a nursing home" for "as defined by G.S. 131-126.1(3); or a nursing home as defined by G.S. 130-9(c)(2)".

CASE NOTES

Applied in Horton v. Carolina Medicorp, Inc., 119 N.C. App. 777, 460 S.E.2d 567 (1995).

Cited in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993); Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

§ 90-21.12. Standard of health care.

Legal Periodicals. —

For note, "Liability in the Absence of a Traditional Physician-Patient Relationship: What Every 'On Call' Doctor Should Know: Mozingo v. Pitt County Memorial Hospital," see 28 Wake Forest L. Rev. 747 (1993).

For note, "The Evolution and Status of the Contributory Negligence Defense to Medical Malpractice Actions in North Carolina — McGill v. French," 16 Campbell L. Rev. 103 (1994).

For comment, "North Carolina's Limited Liability Company Act: A Legislative Mandate for Professional Limited Liability," see 29 Wake Forest L. Rev. 857 (1994).

CASE NOTES

Sexual Assault. — When a plaintiff alleges to have been sexually assaulted by a health care professional, a cause of action may arise from the failure of a health care provider to meet the relevant standard of care. Johnson v. Amethyst Corp., 120 N.C. App. 529, 463 S.E.2d 397 (1995).

Applied in Bailey v. Jones, 112 N.C. App. 380, 435 S.E.2d 787 (1993).

Stated in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

Cited in Davis v. North Carolina Dep't of Human Resources, 121 N.C. App. 105, 465 S.E.2d 2 (1995).

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It is not unlawful for a physician to deviate from the procedures set out in the Right to Natural Death Act, but the physician who does so will lose the benefit of the absolute defense provided in the Act. As a result, the standard of care by which the physician's acts or omissions will be judged will be the general standard of care for physicians which is set out in statutory and common law. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department, of Human Resources, — N.C.A.G. — (January 5, 1995).

§ 90-21.13. Informed consent to health care treatment or procedure.

CASE NOTES

Expert Testimony Required to Establish the Standard of Care. — The standard of care required of a health care provider in a particular case generally concerns specialized knowledge and is thus unfamiliar to most laypersons. Consequently, our courts have consistently held that in the usual medical malpractice or medical negligence case, testimony of a qualified expert is required to establish the standard of care. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Informed Consent and Expert Testimony. — Regarding actions based upon a health care provider's failure to obtain informed consent, subsection (a)(1) requires the use of expert medical testimony by the party seeking to establish the standard of care. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Hospital's Standard of Care Required. — Plaintiff's failure to present prima facie evidence of the standard of care applicable to hospital in obtaining plaintiff's informed consent to undergo a blood transfusion was fatal to claim against defendant hospital. Clark v. Perry, 114 N.C. App. 297, 442 S.E.2d 57 (1994).

Stated in Crawford v. Fayez, 112 N.C. App. 328, 435 S.E.2d 545 (1993).

§ 90-21.14. First aid or emergency treatment; liability limitation.

(a) Any person, including a volunteer medical or health care provider at a facility of a local health department as defined in G.S. 130A-2 or at a nonprofit community health center or a volunteer member of a rescue squad, who receives no compensation for his services as an emergency medical care provider, who renders first aid or emergency health care treatment to a person who is unconscious, ill or injured,

(1) When the reasonably apparent circumstances require prompt decisions and actions in medical or other health care, and

(2) When the necessity of immediate health care treatment is so reasonably apparent that any delay in the rendering of the treatment would seriously worsen the physical condition or endanger the life of the person,

shall not be liable for damages for injuries alleged to have been sustained by the person or for damages for the death of the person alleged to have occurred by reason of an act or omission in the rendering of the treatment unless it is established that the injuries were or the death was caused by gross negligence, wanton conduct or intentional wrongdoing on the part of the person rendering the treatment.

(a1)(1) Any volunteer medical or health care provider at a facility of a local health department or at a nonprofit community health center;

(2) Any volunteer medical or health care provider rendering services to a patient referred by a local health department as defined in G.S. 130A-2(5) or nonprofit community health center at the provider's place of employment; or

(3) Any volunteer medical or health care provider serving as medical director of an emergency medical services (EMS) agency,

who receives no compensation for medical services or other related services rendered at the facility, center, or agency or, who neither charges nor receives a fee for medical services rendered to the patient referred by a local health department or nonprofit community health center at the provider's place of employment shall not be liable for damages for injuries or death alleged to have occurred by reason of an act or omission in the rendering of the services unless it is established that the injuries or death were caused by gross negligence, wanton conduct, or intentional wrongdoing on the part of the person rendering the services. The local health department facility, nonprofit community health center, or agency shall use due care in the selection of volunteer medical or health care providers, and this subsection shall not excuse the health department facility, community health center, or agency for the failure of the volunteer medical or health care provider to use ordinary care in the provision of medical services to its patients.

(b) Nothing in this section shall be deemed or construed to relieve any person from liability for damages for injury or death caused by an act or omission on the part of such person while rendering health care services in the normal and ordinary course of his business or profession. Services provided by a volunteer health care provider who receives no compensation for his services and who renders first aid or emergency treatment to members of athletic teams are deemed not to be in the normal and ordinary course of the volunteer health care provider's business or profession. Services provided by a medical or health care provider who receives no compensation for his services and who voluntarily renders such services at facilities of local health departments as defined in G.S. 130A-2 or at a nonprofit community health center, or as a volunteer medical director of an emergency medical services (EMS) agency, are deemed not to be in the normal and ordinary course of the volunteer medical or health care provider's business or profession.

(c) In the event of any conflict between the provisions of this section and those of G.S. 20-166(d), the provisions of G.S. 20-166(d) shall control and continue in full force and effect. (1975, 2nd Sess., c. 977, s. 4; 1985, c. 611, s. 2; 1989, cc. 498, 655; 1991, c. 655, s. 1; 1993, c. 439, s. 1; 1995, c. 85, s. 1.)

Effect of Amendments. — The 1995 amendment, effective May 17, 1995, and applicable to services rendered on or after that date, added subdivision (a1)(3) and made related changes; in the language following subdivision (a1)(3) inserted "or other related services" preceding "rendered" and inserted "agency" preceding "or, who neither"; in the last sentence of subsection (a1) twice inserted "or agency" following "center"; inserted "or as a volunteer medical director of an emergency medical services (EMS) agency" preceding "are deemed" in the last sentence of subsection (b); and made stylistic changes.

ARTICLE 1D.

Peer Review.

§ 90-21.22. Peer review agreements.

(a) The North Carolina Medical Board may, under rules adopted by the Board in compliance with Chapter 150B of the General Statutes, enter into agreements with the North Carolina Medical Society and its local medical society components, and with the North Carolina Academy of Physician Assistants for the purpose of conducting peer review activities. Peer review activities to be covered by such agreements shall include investigation, review, and evaluation of records, reports, complaints, litigation and other information about the practices and practice patterns of physicians licensed by the Board, and of physician assistants approved by the Board, and shall include programs for impaired physicians and impaired physician assistants. Agreements between the Academy and the Board shall be limited to programs for impaired physicians and physician assistants and shall not include any other peer review activities.

(b) Peer review agreements shall include provisions for the society and for the Academy to receive relevant information from the Board and other sources, conduct the investigation and review in an expeditious manner, provide assurance of confidentiality of nonpublic information and of the review process, make reports of investigations and evaluations to the Board, and to do other related activities for promoting a coordinated and effective peer review process. Peer review agreements shall include provisions assuring due process.

(c) Each society which enters a peer review agreement with the Board shall establish and maintain a program for impaired physicians licensed by the Board. The Academy, after entering a peer review agreement with the Board, shall either enter an agreement with the North Carolina Medical Society for the inclusion of physician assistants in the Society's program for impaired physicians, or shall establish and maintain the Academy's own program for impaired physician assistants. The purpose of the programs shall be to identify, review, and evaluate the ability of those physicians and physician assistants to function in their professional capacity and to provide programs for treatment and rehabilitation. The Board may provide funds for the administration of impaired physician and impaired physician assistant programs and shall adopt rules with provisions for definitions of impairment; guidelines for program elements; procedures for receipt and use of information of suspected impairment; procedures for intervention and referral; monitoring treatment, rehabilitation, post-treatment support and performance; reports of individual cases to the Board; periodic reporting of statistical information; assurance of confidentiality of nonpublic information and of the review process.

(d) Upon investigation and review of a physician licensed by the Board, or a physician assistant approved by the Board, or upon receipt of a complaint or other information, a society which enters a peer review agreement with the Board, or the Academy if it has a peer review agreement with the Board, as appropriate, shall report immediately to the Board detailed information about any physician or physician assistant licensed or approved by the Board if:

(1) The physician or physician assistant constitutes an imminent danger to the public or to himself;

(2) The physician or physician assistant refuses to cooperate with the program, refuses to submit to treatment, or is still impaired after treatment and exhibits professional incompetence; or

(3) It reasonably appears that there are other grounds for disciplinary action.

(e) Any confidential patient information and other nonpublic information acquired, created, or used in good faith by the Academy or a society pursuant to this section shall remain confidential and shall not be subject to discovery or subpoena in a civil case. No person participating in good faith in the peer review or impaired physician or impaired physician assistant programs of this section shall be required in a civil case to disclose any information acquired or opinions, recommendations, or evaluations acquired or developed solely in the course of participating in any agreements pursuant to this section.

(f) Peer review activities conducted in good faith pursuant to any agreement under this section shall not be grounds for civil action under the laws of this State and are deemed to be State directed and sanctioned and shall constitute State action for the purposes of application of antitrust laws. (1987, c. 859, s. 15; 1993, c. 176, s. 1; 1995, c. 94, s. 23.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" at the beginning of subsection (a).

ARTICLE 1E.

Certificate of Public Advantage.

§ 90-21.24. Findings.

The General Assembly of North Carolina makes the following findings:

(1) That technological and scientific developments in health care have enhanced the prospects for further improvement in the quality of care provided to North Carolina citizens.

(2) That the cost of improved technology and improved scientific methods for the provision of health care contributes substantially to the increasing cost of health care. Cost increases make it increasingly difficult for physicians in rural areas of North Carolina to offer care.

(3) That cooperative agreements among physicians, hospitals, and others for the provision of health care services may foster improvements in the quality of health care for North Carolina citizens, moderate increases in cost, and improve access to needed services in rural areas of North Carolina.

(4) That physicians are often in the best position to identify and structure cooperative arrangements that enhance quality of care, improve access, and achieve cost-efficiency in the provision of care.

(5) That federal and State antitrust laws may prohibit or discourage cooperative arrangements that are beneficial to North Carolina citizens, despite their potential for or actual reduction in competition, and that such agreements should be permitted and encouraged.

(6) That competition as currently mandated by federal and State antitrust laws should be supplanted by a regulatory program to permit and encourage cooperative agreements between physicians or between physicians, hospitals, and others, that are beneficial to North Carolina citizens when the benefits of cooperative agreements outweigh their disadvantages caused by their potential or actual adverse effects on competition.

(7) That regulatory as well as judicial oversight of cooperative agreements should be provided to ensure that the benefits of cooperative agreements permitted and encouraged in North Carolina outweigh any disadvantages attributable to any reduction in competition likely to result from the agreements. (1995, c. 395, s. 2.)

Editor's Note. — Session Laws 1995, c. 395, s. 4, made this Article effective October 1, 1995.

Session Laws 1995, c. 395, s. 1, provides: "This act shall be known as the Physician Cooperation Act of 1995."

Session Laws 1995, c. 395, s. 3, provides for the Department of Human Resources to report to the 1999 General Assembly a summary and analysis of the effects of this act.

§ 90-21.25. Definitions.

As used in this Article, the following terms have the meanings specified:

(1) "Attorney General" means the Attorney General of the State of North Carolina, or any attorney to whom the Attorney General delegates authority and responsibility to act pursuant to this Article.

(2) "Cooperative agreement" means an agreement among two or more physicians, or between a physician, hospital, or any other person or persons, for the sharing, allocation, or referral of patients, personnel, instructional programs, support services and facilities, or medical, diagnostic, or laboratory facilities or equipment, or procedures or other services traditionally offered by physicians. Cooperative agreement shall not include any agreement that would permit self-referrals of patients by a health care provider that is otherwise prohibited by law.

(3) "Department" means the North Carolina Department of Human Resources.

(4) "Federal or State antitrust laws" means any and all federal or State laws prohibiting monopolies or agreements in restraint of trade, including, but not limited to, the federal Sherman Act, Clayton Act, and Federal Trade Commission Act, and the North Carolina laws codified in Chapter 75 of the General Statutes.

(5) "Hospital" means any hospital required to be licensed under Chapter 131E or 122C of the General Statutes.

(6) "Person" means any individual, firm, partnership, corporation, association, public or private institution, political subdivision, or government agency.

(7) "Physician" means an individual licensed to practice medicine pursuant to Article 1 of this Chapter. (1995, c. 395, s. 2.)

Editor's Note. — The periods at the end of the subdivisions in this section were added at the direction of the Revisor of Statutes.

§ 90-21.26. Certificate of public advantage; application.

(a) A physician and any person who is a party to a cooperative agreement with a physician may negotiate, enter into, and conduct business pursuant to a cooperative agreement without being subject to damages, liability, or scrutiny under any State antitrust law if a certificate of public advantage is issued for the cooperative agreement, or in the case of activities to negotiate or enter into a cooperative agreement, if an application for a certificate of public advantage is filed in good faith. It is the intention of the General Assembly that immunity from federal antitrust laws shall also be conferred by this statute and the State regulatory program that it establishes.

(b) Parties to a cooperative agreement may apply to the Department for a certificate of public advantage governing that cooperative agreement. The application must include an executed written copy of the cooperative agreement or letter of intent with respect to the agreement, a description of the nature and scope of the activities and cooperation in the agreement, any consideration passing to any party under the agreement, and any additional materials necessary to fully explain the agreement and its likely effects. A copy of the application and all additional related materials shall be submitted to the Attorney General at the same time the application is made to the Department. (1995, c. 395, s. 2.)

§ 90-21.27. Procedure for review; standards for review.

(a) The Department shall review the application in accordance with the standards set forth in subsection (b) of this section and shall hold a public hearing with the opportunity for the submission of oral and written public comments in accordance with rules adopted by the Department. The Department shall determine whether the application should be granted or denied within 90 days of the date of filing of an application. Provided, however, that the Department may extend the review period for a specified period of time upon notice to the parties.

(b) The Department shall determine that a certificate of public advantage should be issued for a cooperative agreement, if it determines that the applicant has demonstrated by clear and convincing evidence that the benefits likely to result from the agreement outweigh the disadvantages likely to result from a reduction in competition from the agreement.

In evaluating the potential benefits of a cooperative agreement, the Department shall consider whether one or more of the following benefits may result from the cooperative agreement:

(1) Enhancement of the quality of health care provided to North Carolina citizens;
(2) Preservation of other health care facilities in geographical proximity to the communities traditionally served by those facilities;
(3) Lower costs of, or gains in the efficiency of delivering, health care services;
(4) Improvements in the utilization of health care resources and equipment;
(5) Avoidance of duplication of health care resources; and
(6) The extent to which medically underserved populations are expected to utilize the proposed services.

In evaluating the potential disadvantages of a cooperative agreement, the Department shall consider whether one or more of the following disadvantages may result from the cooperative agreement:

(1) The extent to which the agreement may increase the costs or prices of health care at the locations of parties to the cooperative agreement;
(2) The extent to which the agreement may have an adverse impact on patients in the quality, availability, and price of health care services;
(3) The extent to which the agreement may reduce competition among the parties to the agreement and the likely effects thereof;
(4) The extent to which the agreement may have an adverse impact on the ability of health maintenance organizations, preferred provider organizations, managed health care service agents, or other health care payors to negotiate

optimal payment and service arrangements with hospitals, physicians, allied health care professionals, or other health care providers;

(5) The extent to which the agreement may result in a reduction in competition among physicians, allied health professionals, other health care providers, or other persons furnishing health care services; and

(6) The availability of arrangements that are less restrictive to competition and achieve the same benefits or a more favorable balance of benefits over disadvantages attributable to any reduction in competition.

In making its determination, the Department may consider other benefits or disadvantages that may be identified. (1995, c. 395, s. 2.)

§ 90-21.28. Issuance of a certificate.

If the Department determines that the likely benefits of a cooperative agreement outweigh the likely disadvantages attributable to reduction of competition as a result of the agreement by clear and convincing evidence, and the Attorney General has not stated any objection to issuance of a certificate during the review period, the Department shall issue a certificate of public advantage for the cooperative agreement at the conclusion of the review period. Such certificate shall include any conditions of operation under the agreement that the Department, in consultation with the Attorney General, determines to be appropriate in order to ensure that the cooperative agreement and activities engaged in pursuant thereto are consistent with this Article and its purpose to limit health care costs. The Department shall include conditions to control prices of health care services provided under the cooperative agreement. Consideration shall be given to assure that access to health care is provided to all areas of the State. The Department shall publish its decisions on applications for certificates of public advantage in the North Carolina Register. (1995, c. 395, s. 2.)

§ 90-21.29. Objection by Attorney General.

If the Attorney General is not persuaded that the applicant has demonstrated by clear and convincing evidence that the benefits likely to result from the agreement outweigh the likely disadvantages of any reduction of competition to result from the agreement as set forth in G.S. 90-21.27, the Attorney General may, within the review period, state an objection to the issuance of a certificate of public advantage and may extend the review period for a specified period of time. Notice of the objection and any extension of the review period shall be provided in writing to the applicant, together with a general explanation of the concerns of the Attorney General. The parties may attempt to reach agreement with the Attorney General on modifications to the agreement or to conditions in the certificate so that the Attorney General no longer objects to issuance of a certificate. If the Attorney General withdraws the objection and the Department maintains its determination that a certificate should be issued, the Department shall issue a certificate of public advantage with any appropriate conditions as soon as practicable following withdrawal of the objection. If the Attorney General does not withdraw the objection, a certificate shall not be issued. (1995, c. 395, s. 2.)

§ 90-21.30. Record keeping.

The Department shall maintain on file all cooperative agreements for which certificates of public advantage are in effect and a copy of the certificate, including any conditions imposed. Any party to a cooperative agreement who terminates an agreement shall file a notice of termination with the Department within 30 days after termination. These files shall be public records as set forth in Chapter 132 of the General Statutes. (1995, c. 395, s. 2.)

§ 90-21.31. Review after issuance of certificate.

If at any time following the issuance of a certificate of public advantage, the Department or the Attorney General has questions concerning whether the parties to the cooperative agreement have complied with any condition of the certificate or whether the benefits or likely benefits resulting from a cooperative agreement may no longer outweigh the disadvantages or likely disadvantages attributable to a reduction in competition resulting from the agreement, the Department or the Attorney General shall advise the parties to the agreement and either the Department or the Attorney General shall request any information necessary to complete a review of the matter. (1995, c. 395, s. 2.)

§ 90-21.32. Periodic reports.

(a) During the time that a certificate is in effect, a report of activities pursuant to the cooperative agreement must be filed every two years with.the Department on or by the anniversary day on which the certificate was issued. A copy of the periodic report shall be submitted to the Attorney General at the same time it is filed with the Department. A report shall include all of the following:

(1) A description of the activities conducted pursuant to the agreement.

(2) Price and cost information.

(3) The nature and scope of the activities pursuant to the agreement anticipated for the next two years and the likely effect of those activities.

(4) A signed certificate by each party to the agreement that the benefits or likely benefits of the cooperative agreement as conditioned continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement as conditioned.

(5) Any additional information requested by the Department or the Attorney General.

The Department shall give public notice in the North Carolina Register that a report has been received. After notice is given, the public shall have 30 days to file written comments on the report and on the benefits and disadvantages of continuing the certificate of public advantage. Periodic reports, public comments, and information submitted in response to a request shall be public records as set forth in Chapter 132 of the General Statutes.

(b) Failure to file a periodic report required by this section after notice of default, or failure to provide information requested pursuant to a review under G.S. 90-21.31 are grounds for revocation of the certificate by the Attorney General or the Department.

(c) The Department shall review each periodic report, public comments, and information submitted in response to a request under G.S. 90-21.31 to determine whether the advantages or likely advantages of the cooperative agreement continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement, and to determine what, if any, changes in the conditions of the certificate should be made. In the review the Department shall consider the benefits and disadvantages set forth in G.S. 90-21.27. Within 60 days of the filing of a periodic report, the Department shall determine whether the certificate should remain in effect and whether any changes to the conditions in the certificate should be made. Provided, however, that the Department may extend the review period an additional 30 days. If the Department or Attorney General determines that the parties to the cooperative agreement have not complied with any condition of the certificate, the Department or the Attorney General shall revoke the certificate and the parties shall be notified. If the certificate is revoked, the parties shall be entitled to no benefits under this Article, beginning on the date of revocation. If the Department determines that the certificate should remain in effect and the Attorney General has not stated any objection to the certificate remaining in effect during the review period, the certificate shall remain in effect subject to any changes in the conditions of the certificate imposed by the Department. The parties shall be notified in writing of the Department's decision and of any changes in the conditions of the certificate. The Department shall publish its decision and any changes in the conditions in the North Carolina Register.

If the Department determines that the benefits or likely benefits of the agreement and the unavoidable costs of terminating the agreement do not continue to outweigh the disadvantages or likely disadvantages of any reduction in competition from the agreement, or if the Attorney General objects to the certificate remaining in effect based upon a review of the benefits and disadvantages set forth in G.S. 90-21.27, the Department shall notify the parties to the agreement in writing of its determination or the objections of the Attorney General and shall provide a summary of any concerns of the Department or Attorney General to the parties. (1995, c. 395, s. 2.)

§ 90-21.33. Right to judicial action.

(a) Any applicant or other person aggrieved by a decision to issue or not issue a certificate of public advantage is entitled to judicial review of the action or inaction in superior court. Suit for judicial review under this subsection shall be filed within 30 days of public notice of the decision to issue or deny issuance of the certificate. To prevail in any action for judicial review brought under this subsection, the plaintiff or petitioner must establish that the determination by the Department or the Attorney General was arbitrary or capricious.

(b) Any party or other person aggrieved by a decision to allow the certificate to remain in effect or to make changes in the conditions of the certificate is entitled to judicial review of the decision in superior court. Suit for judicial review under this subsection shall be filed within 30 days of public notice of the decision to allow the certificate to remain in effect or to make changes in the conditions of the certificate. To prevail in any action for judicial review brought under this subsection, the plaintiff or petitioner must establish that the determination by the Department or the Attorney General was arbitrary or capricious.

(c) If the Department or the Attorney General determines the certificate should not remain in effect, the Attorney General may bring suit in the Superior Court of Wake County on behalf of the Department or on its own behalf to seek an order to authorize the cancellation of the certificate. To prevail in the action, the Attorney General must establish that the benefits resulting from the agreement are outweighed by the disadvantages attributable to reduction in competition resulting from the agreement.

(d) In any action instituted under this section, the work product of the Department or the Attorney General or his staff is not a public record under Chapter 132 of the General Statutes and shall not be discoverable or admissible, nor shall the Attorney General or any member of the Attorney General's staff be compelled to be a witness, whether in discovery or at any hearing or trial. (1995, c. 395, s. 2.)

§ 90-21.34. Fees for applications and periodic reports.

(a) The Department and the Attorney General shall establish and collect administrative fees for filing of an application for a certificate of public advantage based on the total cost of the project for which the application is made, in an amount not to exceed fifteen thousand dollars ($15,000), and an administrative fee for filing each periodic report required to be filed in an amount not to exceed two thousand five hundred dollars ($2,500). The fee schedule established should generate sufficient revenue to offset the costs of the program. An application filing fee must be paid to the Department at the time an application for a certificate of public advantage is submitted pursuant to G.S. 90-21.26. A periodic report filing fee must be paid to the Department at the time a periodic report is submitted to it pursuant to G.S. 90-21.32.

(b) If the Department or the Attorney General determines that consultants are needed to complete a review of an application, an additional application fee may be established by prior agreement with the applicants before the application is considered. The amount of the additional fee may not exceed the costs of contracting with the necessary consultants. The additional fee shall not be considered in determining whether an application fee exceeds the maximum application fee amount set in subsection (a) of this section. (1995, c. 395, s. 2.)

§ 90-21.35. Department and Attorney General authority.

The Department and Attorney General shall adopt rules to conduct review of applications for certificates of public advantage and of periodic reports filed in connection therewith and to bring actions in the Superior Court of Wake County as required under G.S. 90-21.33. This Article shall not limit the authority of the Attorney General under federal or State antitrust laws. (1995, c. 395, s. 2.)

§ 90-21.36. Effects of certificate of public advantage; other laws.

(a) Activities conducted pursuant to a cooperative agreement for which a certificate of public advantage has been issued are immunized from challenge or scrutiny under State antitrust laws. In addition, conduct in negotiating and entering into a cooperative agreement for which an application for a certificate of public advantage is filed in good faith shall be immune from challenge or scrutiny under State antitrust laws, regardless of whether a certificate is issued. It is the intention of the General Assembly that this Article shall also immunize covered activities from challenge or scrutiny under any noncompetition provisions of the federal antitrust law.

(b) Nothing in this Article shall exempt physicians or others from compliance with State or federal laws governing certificate of need, licensure, or other regulatory requirements.

(c) Any dispute among the parties to cooperative agreement concerning its meaning or terms is governed by normal principles of contract law. (1995, c. 395, s. 2.)

§§ 90-21.37 through 90-21.40: Reserved for future codification purposes.

ARTICLE 2.

Dentistry.

§ 90-26. Annual and special meetings.

The North Carolina State Board of Dental Examiners shall meet annually on the date and at the time and place as may be determined by the Board, and at such other dates, times, and places as may be determined by action of the Board or by any majority of the members thereof. Notice of the date, time, and place of the annual meeting and of the date, time, and place of any special or called meeting shall be given in writing, by registered or certified mail or personally, to each member of the Board at least 10 days prior to said meeting; provided the requirements of notice may be waived by any member of the Board. At the annual meeting or at any special or called meeting, the said Board shall have the power to conduct examination of applicants and to transact such other business as may come before it, provided that in case of a special meeting, the purpose for which said meeting is called shall be stated in the notice. (1935, c. 66, s. 3; 1961, c. 446, s. 1; 1981, c. 751, s. 4; 1995 (Reg. Sess., 1996), c. 584, s. 5.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 20, 1996, in the first sentence substituted "the date and at the time and" for "the fourth Monday in June of each year at such" preceding "place as may be determined by the Board", inserted "dates" following "at such other"; and in the second sentence inserted "date, time, and" preceding "place of the annual meeting", and substituted "date, time, and place" for "time and place" preceding "of any special or called meeting."

§ 90-27. Judicial powers; additional data for records.

Editor's Note. — Session Laws 1993, c. 539, s. 616, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-29. Necessity for license; dentistry defined; exemptions.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-29.2. Requirements in respect to written work orders; penalty.

Editor's Note. — Session Laws 1993, c. 539, ss. 617, 618, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-30.1. Standards for general anesthesia and parenteral sedation; fees authorized.

The North Carolina Board of Dental Examiners may establish by regulation reasonable education, training, and equipment standards for safe administration and monitoring of general anesthesia and parenteral sedation for outpatients in the dental setting. Regulatory standards may include a permit process for general anesthesia and parenteral sedation by dentists. The requirements of any permit process adopted under the authority of this section must include provisions that will allow a dentist to qualify for continued use of general anesthesia, if he or she is licensed to practice dentistry in North Carolina and shows the Board that he or she has been utilizing general anesthesia in a competent manner for the five years preceding July 1, 1988, and his or her office facilities pass an on-site examination and inspection by qualified representatives of the Board. In order to provide the means of regulating general anesthesia and parenteral sedation, including examination and inspection of dental offices involved, the Board may charge and collect fees established by its rules for each permit application, each annual permit renewal, and each office inspection in an amount not to exceed the maximum fee amounts set forth in G.S. 90-39. (1987 (Reg. Sess., 1988), c. 1073; 1989, c. 648; 1989 (Reg. Sess., 1990), c. 1066, s. 12(a); 1995 (Reg. Sess., 1996), c. 584, s. 2.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 20, 1996, substituted "for each permit application, each annual permit renewal, and each office inspection in an amount not to exceed the maximum fee amounts set forth in G.S. 90-39" for "and regulations not exceeding fifty dollars ($50.00) for each permit application and each annual renewal, and not exceeding three hundred fifty dollars ($350.00) for each office inspection."

§ 90-31. Annual renewal of licenses.

The laws of North Carolina now in force, having provided for the annual renewal of any license issued by the North Carolina State Board of Dental Examiners, it is hereby declared to be the policy of this State, that all licenses heretofore issued by the North Carolina State Board of Dental Examiners or hereafter issued by said Board are subject to annual renewal and the exercise of any privilege granted by any license heretofore issued or hereafter issued by the North Carolina State Board of Dental Examiners is subject to the issuance on or before the first day of January of each year of a certificate of renewal of license.

On or before the first day of January of each year, each dentist engaged in the practice of dentistry in North Carolina shall make application to the North Carolina State Board of Dental Examiners and receive from said Board, subject to the further provisions of this section and of this Article, a certificate of renewal of said license.

The application shall show the serial number of the applicant's license, his full name, address and the county in which he has practiced during the preceding year, the date of the original issuance of license to said applicant and such other information as the said Board from time to time may prescribe, at least six months prior to January 1 of any year.

If the application for such renewal certificate, accompanied by the fee required by this Article, is not received by the Board before January 31 of each year, an additional fee shall be charged for renewal certificate. The maximum penalty fee for late renewal is set forth in G.S. 90-39. If such application, accompanied by the renewal fee, plus the additional fee, is not received by the Board before March 31 of each year, every person thereafter continuing to practice dentistry without having applied for a certificate of renewal shall be guilty of the unauthorized practice of dentistry and shall be subject to the penalties prescribed by G.S. 90-40. (1935, c. 66, s. 8; 1953, c. 564, s. 5; 1961, c. 446, s. 6; 1971, c. 755, s. 5; 1995 (Reg. Sess., 1996), c. 584, s. 3.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 20, 1996, in the last paragraph deleted "of ten dollars ($10.00)" preceding "shall be charged" in the first sentence, and added the present second sentence.

§ 90-35. Duplicate licenses.

When a person is a holder of a license to practice dentistry in North Carolina or the holder of a certificate of renewal of license, he may make application to the North Carolina State Board of Dental Examiners for the issuance of a copy or a duplicate thereof accompanied by a fee that shall not exceed the maximum fee for a duplicate license or certificate set forth in G.S. 90-39. Upon the filing of the application and the payment of the fee, the said Board shall issue a copy or duplicate. (1935, c. 66, s. 8; 1961, c. 446, s. 7; 1995 (Reg. Sess., 1996), c. 584, s. 4.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 20, 1996, substituted "that shall not exceed the maximum fee for a duplicate license or certificate set forth in G.S. 90-39" for "of five dollars ($5.00)" in the first sentence.

§ 90-39. Fees.

In order to provide the means of carrying out and enforcing the provisions of this Article and the duties devolving upon the North Carolina State Board of Dental Examiners, it is authorized to charge and collect fees established by its rules and regulations not exceeding the following:

(1) Each application for general dentistry examination $500.00
(2) Each general dentistry license renewal, which fee shall be annually fixed by the Board and not later than November 30 of each year it shall give written notice of the amount of the renewal fee to each dentist licensed to practice in this State by mailing such notice to the last address of record with the Board of each such dentist 140.00
(2a) Penalty for late renewal of any license or permit . . 50.00
(3) Each provisional license 150.00
(4) Each intern permit or renewal thereof 150.00
(5) Each certificate of license to a resident dentist desiring to change to another state or territory 30.00
(6) Repealed by Session Laws 1995, (Reg. Sess., 1996), c. 584, s. 1, effective June 20, 1996.
(7) Each license to resume the practice issued to a dentist who has retired from and returned to this State 300.00
(8) Each instructor's license or renewal thereof 140.00
(9) With each renewal of a dentistry license, an annual fee to help fund special peer review organizations for impaired dentists 50.00
(10) Each duplicate of any license, permit, or certificate issued by the Board 25.00
(11) Each office inspection for general anesthesia and parenteral sedation permits 350.00
(12) Each general anesthesia and parenteral sedation permit application or renewal of permit .... 50.00.

(1935, c. 66, s. 12; 1953, c. 564, s. 1; 1961, c. 446, s. 8; 1965, c. 163, s. 3; 1971, c. 755, s. 8; 1979, 2nd Sess., c. 1195, s. 12; 1987, c. 555, s. 1; 1993, c. 420, s. 1; 1995 (Reg. Sess., 1996), c. 584, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 20, 1996, added subdivisions (2a), (10), (11), and (12); deleted subdivision (6), which read "Each license issued to a practitioner of another state or territory to practice in this State...125.00"; and increased the fees in subdivisions (1), (2), (3), (4), (5), (7), and (8).

§ 90-40. Unauthorized practice; penalty.

Editor's Note. — Session Laws 1993, c. 539, s. 619, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-41. Disciplinary action.

Legal Periodicals. —
For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Dentist's administering of nitrous oxide sedation to a female patient while no one else was present in the office constituted negligence in the practice of dentistry. McCollough v. North Carolina State Bd. of Dental Exmrs., 111 N.C. App. 186, 431 S.E.2d 816, cert. denied, 335 N.C. 174, 436 S.E.2d 381 (1993).

§ 90-48. Rules and regulations of Board; violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 620, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 4A.

North Carolina Pharmacy Practice Act.

§ 90-85.3. Definitions.

(a) "Administer" means the direct application of a drug to the body of a patient by injection, inhalation, ingestion or other means.

(b) "Board" means the North Carolina Board of Pharmacy.

(c) "Compounding" means taking two or more ingredients and combining them into a dosage form of a drug, exclusive of compounding by a drug manufacturer, distributor, or packer.

(d) "Deliver" means the actual, constructive or attempted transfer of a drug, a device, or medical equipment from one person to another.

(e) "Device" means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent or other similar or related article including any component part or accessory, whose label or labeling bears the statement "Caution: federal law requires dispensing by or on the order of a physician." The term does not include:

(1) Devices used in the normal course of treating patients by

health care facilities and agencies licensed under Chapter 131E or Article 2 of Chapter 122C of the General Statutes;

(2) Devices used or provided in the treatment of patients by medical doctors, dentists, physical therapists, occupational therapists, speech pathologists, optometrists, chiropractors, podiatrists, and nurses licensed under Chapter 90 of the General Statutes, provided they do not dispense devices used to administer or dispense drugs.

(f) "Dispense" means preparing and packaging a prescription drug or device in a container and labeling the container with information required by State and federal law. Filling or refilling drug containers with prescription drugs for subsequent use by a patient is "dispensing". Providing quantities of unit dose prescription drugs for subsequent administration is "dispensing".

(g) "Drug" means:

(1) Any article recognized as a drug in the United States Pharmacopeia, or in any other drug compendium or any supplement thereto, or an article recognized as a drug by the United States Food and Drug Administration;

(2) Any article, other than food or devices, intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or other animals;

(3) Any article, other than food or devices, intended to affect the structure or any function of the body of man or other animals; and

(4) Any article intended for use as a component of any articles specified in clause (1), (2) or (3) of this subsection.

(h) "Emancipated minor" means any person under the age of 18 who is or has been married or who is or has been a parent; or whose parents or guardians have surrendered their rights to the minor's services and earnings as well as their right to custody and control of the minor's person; or who has been emancipated by an appropriate court order.

(i) "Health care provider" means any licensed health care professional; any agent or employee of any health care institution, health care insurer, health care professional school; or a member of any allied health profession.

(j) "Label" means a display of written, printed or graphic matter upon the immediate or outside container of any drug.

(k) "Labeling" means preparing and affixing a label to any drug container, exclusive of labeling by a manufacturer, packer or distributor of a nonprescription drug or a commercially packaged prescription drug or device.

(*l*) "License" means a license to practice pharmacy including a renewal license issued by the Board.

(*l*1) "Medical equipment" means any of the following items that are intended for use by the consumer in the consumer's place of residence:

(1) A device.
(2) Ambulation assistance equipment.
(3) Mobility equipment.
(4) Rehabilitation seating.
(5) Oxygen and respiratory care equipment.
(6) Rehabilitation environmental control equipment.
(7) Diagnostic equipment.

(8) A bed prescribed by a physician to treat or alleviate a medical condition.

The term "medical equipment" does not include (i) medical equipment used or dispensed in the normal course of treating patients by or on behalf of home care agencies, hospitals, and nursing facilities licensed under Chapter 131E of the General Statutes or hospitals or agencies licensed under Article 2 of Chapter 122C of the General Statutes; (ii) medical equipment used or dispensed by professionals licensed under Chapters 90 or 93D of the General Statutes, provided the professional is practicing within the scope of that professional's practice act; (iii) upper and lower extremity prosthetics and related orthotics; or (iv) canes, crutches, walkers, and bathtub grab bars.

(m) "Permit" means a permit to operate a pharmacy, deliver medical equipment, or dispense devices, including a renewal license issued by the Board.

(n) "Person" means an individual, corporation, partnership, association, unit of government, or other legal entity.

(o) "Person in loco parentis" means the person who has assumed parental responsibilities for a child.

(p) "Pharmacist" means a person licensed under this Article to practice pharmacy.

(q) "Pharmacy" means any place where prescription drugs are dispensed or compounded.

(r) "Practice of pharmacy" means the responsibility for: interpreting and evaluating drug orders, including prescription orders; compounding, dispensing and labeling prescription drugs and devices; properly and safely storing drugs and devices; maintaining proper records; and controlling pharmacy goods and services. A pharmacist may advise and educate patients and health care providers concerning therapeutic values, content, uses and significant problems of drugs and devices; assess, record and report adverse drug and device reactions; take and record patient histories relating to drug and device therapy; monitor, record and report drug therapy and device usage; perform drug utilization reviews; and participate in drug and drug source selection and device and device source selection as provided in G.S. 90-85.27 through G.S. 90-85.31. A pharmacist who has received special training may be authorized and permitted to administer drugs pursuant to a specific prescription order in accordance with rules and regulations adopted by each of the Boards of Pharmacy, the Board of Nursing, and the North Carolina Medical Board. Such rules and regulations shall be designed to ensure the safety and health of the patients for whom such drugs are administered.

(s) "Prescription drug" means a drug that under federal law is required, prior to being dispensed or delivered, to be labeled with the following statement:

"Caution: Federal law prohibits dispensing without prescription."

(t) "Prescription order" means a written or verbal order for a prescription drug, prescription device, or pharmaceutical service from a person authorized by law to prescribe such drug, device, or service. A prescription order includes an order entered in a chart or other medical record of a patient.

(u) "Unit dose medication system" means a system in which each dose of medication is individually packaged in a properly sealed and properly labeled container. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1983, c. 196, ss. 1-3; 1991, c. 578, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 2; 1995, c. 94, s. 24.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "drug, a device, or medical equipment" for "drug or device" in subsection (d); added subsection (*l*1); and inserted "deliver medical equipment" in subsection (m).

The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners of the State of North Carolina" in subsection (r).

§ 90-85.21. Pharmacy permit.

(a) In accordance with Board regulations, each pharmacy in North Carolina shall annually register with the Board on a form provided by the Board. The application shall identify the pharmacist-manager of the pharmacy and all pharmacist personnel employed in the pharmacy. All pharmacist-managers shall notify the Board of any change in pharmacist personnel within 30 days of such change.

(b) Each physician who dispenses prescription drugs, for a fee or other charge, shall annually register with the Board on the form provided by the Board, and with the licensing board having jurisdiction over the physician. Such dispensing shall comply in all respects with the relevant laws and regulations that apply to pharmacists governing the distribution of drugs, including packaging, labeling, and record keeping. Authority and responsibility for disciplining physicians who fail to comply with the provisions of this subsection are vested in the licensing board having jurisdiction over the physician. The form provided by the Board under this subsection shall be as follows:

Application For Registration
With The Pharmacy Board
As A Dispensing Physician

1.	2.
Name and Address of Dispensing Physician	Affix Dispensing Label Here

3. Physician's North Carolina License Number ....

4. Are you currently practicing in a professional association registered with the North Carolina Medical Board?
.... Yes .... No. If yes, enter the name and registration number of the professional corporation:
....
....

5. I certify that the information is correct and complete.

....
Signature Date

(1927, c. 28, s. 1; 1953, c. 183, s. 2; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1987, c. 687; 1995, c. 94, s. 25.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "North Carolina Board of Medical Examiners" in part 4 of the form in subsection (b).

§ 90-85.22. Device and medical equipment permits.

(a) Devices. — Each place where devices are dispensed shall register annually with the Board on a form provided by the Board and obtain a device permit. A business that has a current pharmacy permit does not have to register and obtain a device permit. Records of devices dispensed in pharmacies or other places shall be kept in accordance with rules adopted by the Board.

(b) Medical Equipment. — Each place that delivers medical equipment to the user of the equipment shall register annually with the Board on a form provided by the Board and obtain a medical equipment permit. A business that has a current pharmacy permit or a current device permit does not have to register and obtain a medical equipment permit. Medical equipment shall be delivered only in accordance with requirements established by rules adopted by the Board. (1981 (Reg. Sess., 1982), c. 1188, s. 1; 1993 (Reg. Sess., 1994), c. 692, s. 1.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Device and medical equipment permits" for "Devices; registration" as the catchline of this section; added the subsection (a) designation and rewrote subsection (a); and added subsection (b).

§ 90-85.24. Fees collectible by Board.

The Board of Pharmacy shall be entitled to charge and collect not more than the following fees: for the examination of an applicant for license as a pharmacist, one hundred fifty dollars ($150.00) plus the cost of the test material; for renewing the license as a pharmacist, sixty-five dollars ($65.00); for renewing the license of an assistant pharmacist, ten dollars ($10.00); for licenses without examination as provided in G.S. 90-85.20, original, three hundred dollars ($300.00); for original registration of a drugstore, two hundred fifty dollars ($250.00), and renewal thereof, one hundred twenty-five dollars ($125.00); for registration to dispense devices, deliver medical equipment, or both, three hundred dollars ($300.00) per year. All fees shall be paid before any applicant may be admitted to examination or the applicant's name may be placed upon the register of pharmacists or before any license or permit, or any renewal thereof, may be issued by the Board. (1905, c. 108, s. 12; Rev., s. 4478; C.S., s. 6657; 1921, c. 57, s. 3; 1945, c. 572, s. 3; 1953, c. 183, s. 1; 1965, c. 676, s. 1; 1973, c. 1183; 1981, c. 72; c. 717, s. 3; 1981 (Reg. Sess., 1982), c. 1188, s. 2; 1983, c. 196, s. 8; 1987, c. 260; 1987 (Reg. Sess., 1988), c. 1039, s. 4; 1993 (Reg. Sess., 1994), c. 692, s. 3.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, inserted "for registration to dispense devices, deliver medical equipment, or both, three hundred dollars ($300.00) per year" in the first sentence, and substituted "the applicant's name may be" for "his name" in the second sentence.

§ 90-85.27. Definitions.

Editor's Note. —
Session Laws 1993, c. 321, s. 222(f), Session Laws 1995, c. 324, s. 23.14(h), and Session Laws 1996, Second Extra Session, c. 18, s. 24, provide:

"Dispensing of Generic Drugs. — Notwithstanding G.S. 90-85.27 through G.S. 90-85.31, under the Medical Assistance Program (Title XIX of the Social Security Act) a prescription order for a drug designated by a trade or brand name shall be considered to be an order for the drug by its established or generic name, except when the prescriber personally indicates, either orally or in his own handwriting on the prescription order, 'dispense as written' or words of similar meaning. Generic drugs, when available in the pharmacy, shall be dispensed at a lower cost to the Medical Assistance Program rather than trade or brand name drugs, subject to the prescriber's 'dispense as written' order as noted above.

"As used in this subsection 'brand name' means the proprietary name the manufacturer places upon a drug product or on its container, label, or wrapping at the time of packaging; and 'established name' has the same meaning as in section 502(e)(3) of the Federal Food, Drug and Cosmetic Act as amended, 21 U.S.C. § 352(e)(3)."

Session Laws 1995, c. 324, s. 1.1, provides: "This act shall be known as the Continuation Budget Operations Appropriations Act of 1995."

Session Laws 1995, c. 324, s. 28.3, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 biennium, the textual provisions of this act shall apply only to funds appropriated for and activities occurring during the 1995-97 biennium."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

§ 90-85.28. Selection by pharmacists permissible; prescriber may permit or prohibit selection; price limit on selected drugs.

Editor's Note. —
For provisions of Session Laws 1993, c. 321, s. 222(f), and Sesion Laws 1995, c. 324, s. 23.14 (h), relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's Note under § 90-85.27.

§ 90-85.29. Prescription label.

Editor's Note. —
For provisions of Session Laws 1993, c. 321, s. 222(f), and Session Laws 1995, c. 324, s. 23.14(h), relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's Note under § 90-85.27.

§ 90-85.30. Prescription record.

Editor's Note. —
For provisions of Session Laws 1993, c. 321, s. 222(f), and Session Laws 1995, c. 324, s. 23.14(h), relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's Note under § 90-85.27.

§ 90-85.31. Prescriber and pharmacist liability not extended.

Editor's Note. —

For provisions of Session Laws 1993, c. 321, s. 222(f), and Session Laws 1995, c. 324, s. 23.14(h), relating to the dispensing of generic drugs under the Medical Assistance Program, see the Editor's Note under § 90-85.27.

§ 90-85.40. Violations.

(a) It shall be unlawful for any owner or manager of a pharmacy or other place to allow or cause anyone other than a pharmacist to dispense or compound any prescription drug except as an aide to and under supervision of a pharmacist.

(b) Every person lawfully authorized to compound or dispense prescription drugs shall comply with all the laws and regulations governing the labeling and packaging of such drugs by pharmacists.

(c) It shall be unlawful for any person not licensed as a pharmacist to compound or dispense any prescription drug, except as an aide to and under the supervision of a pharmacist.

(d) It shall be unlawful for any person to manage any place of business where devices are dispensed or sold at retail without a permit as required by this Article.

(d1) It is unlawful for a person to own or manage a place of business from which medical equipment is delivered without a permit as required by this Article.

(e) It shall be unlawful for any person without legal authorization to dispose of an article that has been embargoed under this Article.

(f) It shall be unlawful to violate any provision of this Article or of any rules or regulations enacted pursuant to it.

(g) This Article shall not be construed to prohibit any person from performing an act that person is authorized to perform pursuant to North Carolina law. Health care providers who are authorized to prescribe drugs without supervision are authorized to dispense drugs without supervision.

(h) A violation of this Article shall be a Class 1 misdemeanor. (1905, c. 108, ss. 4, 23, 24; Rev., ss. 3649, 3650, 4487; C.S., ss. 6667, 6668, 6669; 1921, c. 68, ss. 6, 7; Ex. Sess. 1924, c. 116; 1953, c. 1051; 1957, c. 617; 1959, c. 1222; 1981 (Reg. Sess., 1982), c. 1188, s. 1; 1993, c. 539, s. 621; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 692, s. 4.)

Editor's Note. — Session Laws 1993, c. 539, s. 621, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, added subsection (d1).

ARTICLE 5.

North Carolina Controlled Substances Act.

§ 90-86. Title of Article.

CASE NOTES

Cited in State v. McRae, 110 N.C. App. 643, 430 S.E.2d 434 (1993).

§ 90-87. Definitions.

CASE NOTES

I. General Consideration.

I. GENERAL CONSIDERATION.

Stated in State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994).

§ 90-89. Schedule I controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse, no currently accepted medical use in the United States, or a lack of accepted safety for use in treatment under medical supervision. The following controlled substances are included in this schedule:

(a) Any of the following opiates, including the isomers, esters, ethers, salts and salts of isomers, esters, and ethers, unless specifically excepted, or listed in another schedule, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation:

01. Acetyl-alpha-methylfentanyl (N[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide).
1. Acetylmethadol.
1a. Repealed by Session Laws 1987, c. 412, s. 2.
1b. Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide).
2. Allylprodine.
3. Alphacetylmethadol.
4. Alphameprodine.
5. Alphamethadol.
5a. Alpha-methylfentanyl (N-(1-(alpha-methyl-beta-phenyl) ethyl-4-piperidyl) propionalilide; 1(1-methyl-2-phenylethyl)-4-(N-propanilido) piperidine).
6. Benzethidine.
7. Betacetylmethadol.
7a. Beta-hydroxfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide).
7b. Beta-hydroxy-3-methylfentanyl (N-[1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl]-N-phenylpropanamide).

8. Betameprodine.
9. Betamethadol.
10. Betaprodine.
11. Clonitazene.
12. Dextromoramide.
13. Diampromide.
14. Diethylthiambutene.
15. Difenoxin.
16. Dimenoxadol.
17. Dimepheptanol.
18. Dimethylthiambutene.
19. Dioxaphetyl butyrate.
20. Dipipanone.
21. Ethylmethylthiambutene.
22. Etonitazene.
23. Etoxeridine.
24. Furethidine.
25. Hydroxypethidine.
26. Ketobemidone.
27. Levomoramide.
28. Levophenacylmorphan.
28a. 1-methyl-4-phenyl-4-propionoxypiperidine (MPPP).
28b. 3-Methylfentanyl (N-[3-methyl-1-(2-Phenylethyl)-4-Piperidyl]-N-Phenylpropanamide).
28c. 3-Methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide).
29. Morpheridine.
30. Noracymethadol.
31. Norlevorphanol.
32. Normethadone.
33. Norpipanone.
33a. Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl]-propanamide.
34. Phenadoxone.
35. Phenampromide.
35a. 1-(2-phenethyl)-4-phenyl-4-acetoxypiperidine (PEPAP).
36. Phenomorphan.
37. Phenoperidine.
38. Piritramide.
39. Proheptazine.
40. Properidine.
41. Propiram.
42. Racemoramide.
42a. Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide.
42b. Tilidine.
43. Trimeperidine.

(b) Any of the following opium derivatives, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Acetorphine.
2. Acetyldihydrocodeine.
3. Benzylmorphine.
4. Codeine methylbromide.

5. Codeine-N-Oxide.
6. Cyprenorphine.
7. Desomorphine.
8. Dihydromorphine.
9. Etorphine (except hydrochloride salt).
10. Heroin.
11. Hydromorphinol.
12. Methyldesorphine.
13. Methyldihydromorphine.
14. Morphine methylbromide.
15. Morphine methylsulfonate.
16. Morphine-N-Oxide.
17. Myrophine.
18. Nicocodeine.
19. Nicomorphine.
20. Normorphine.
21. Pholcodine.
22. Thebacon.
23. Drotebanol.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. 3, 4-methylenedioxyamphetamine.
2. 5-methoxy-3, 4-methylenedioxyamphetamine.
2a. 3, 4-Methylenedioxymethamphetamine (MDMA).
2b. 3,4-methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4-(methylenedioxy)phenethylamine, N-ethyl MDA, MDE, and MDEA).
2c. N-hydroxy-3,4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3,4-(methylenedioxy)phenethylamine, and N-hydroxy MDA).
3. 3, 4, 5-trimethoxyamphetamine.
3a. Alpha-ethyltryptamine. Some trade or other names: etryptamine, Monase, alpha-ethyl-1H-indole-3-ethanamine, 3-(2-aminobutyl) indole, alpha-ET, and AET.
4. Bufotenine.
5. Diethyltryptamine.
6. Dimethyltryptamine.
7. 4-methyl-2, 5-dimethoxyamphetamine.
8. Ibogaine.
9. Lysergic acid diethylamide.
10. Mescaline.
11. Peyote, meaning all parts of the plant presently classified botanically as Lophophora Williamsii Lemaire, whether growing or not; the seeds thereof; any extract from any part of such plant; and every compound, manufacture, salt, derivative, mixture or preparation of such plant, its seed or extracts.
12. N-ethyl-3-piperidyl benzilate.
13. N-methyl-3-piperidyl benzilate.
14. Psilocybin.
15. Psilocyn.
16. 2, 5-dimethoxyamphetamine.

16a. 2, 5-dimethoxy-4-ethylamphetamine. Some trade or other names: DOET.
17. 4-bromo-2, 5-dimethoxyamphetamine.
18. 4-methoxyamphetamine.
19. Ethylamine analog of phencyclidine. Some trade or other names: N-ethyl-1-phenylcyclohexylamine, (1-phenylcyclohexyl) ethylamine, N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE.
20. Pyrrolidine analog of phencyclidine. Some trade or other names: 1-(1-phenylcyclohexyl)-pyrrolidine, PCPy, PHP.
21. Thiophene analog of phencyclidine. Some trade or other names: 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienyl analog of phencyclidine, TPCP, TCP.
21a. 1-[1-(2-thienyl)cyclohexyl]pyrrolidine; Some other names: TCPy.
22. Parahexyl.

(d) Any material compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

1. Mecloqualone.
2. Methaqualone.

(e) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation that contains any quantity of the following substances having as stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:

1. Aminorex. Some trade or other names: aminoxaphen; 2-amino-5-phenyl-2-oxazoline; or 4,5-dihydro-5- phenly-2-oxazolamine.
2. Cathinone. Some trade or other names: 2-amino-1-phenyl-1-propanone, alpha-aminopropiophenone, 2-aminopropiophenone, and norephedrone.
3. Fenethylline.
4. Methcathinone. Some trade or other names: 2-(methylamino)-propiophenone, alpha-(methylamino)propiophenone, 2-(methylamino)-1-phenylpropan-1-one, alpha-N-methylaminopropiophenone, monomethylproprion, ephedrone, N-methylcathinone, methylcathinone, AL- 464, AL-422, AL-463, and UR1432.
5. (+/-)cis-4-methylaminorex [(+/-)cis-4,5-dihydro-4- methyl-5-phenyl-2-oxazolamine] (also known as 2-amino-4-methyl-5-phenyl-2-oxazoline).
6. N,N-dimethylamphetamine. Some other names: N,N,alpha-trimethylbenzeneethaneamine; N,N,alpha-trimethylphenethylamine.
7. N-ethylamphetamine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 844; c. 1358, ss. 4, 5, 15; 1975, c. 443, s. 1; c. 790; 1977, c. 667, s. 3; c. 891, s. 1; 1979, c. 434, s. 1; 1981, c. 51, s. 9; 1983, c. 695, s. 1; 1985, c. 172, ss. 1-3; 1987, c. 412, ss. 1-5; 1989 (Reg. Sess., 1990), c. 1040, s. 1; 1993, c. 319, ss. 1, 2; 1995, c. 186, ss. 2, 3.)

Editor's Note. — Session Laws 1995, c. 186, s. 1, effective October 1, 1995, set out subsection (a) of this section but appeared to have made no changes thereto, and was repealed by Session Laws 1995, c. 509, s. 135.1 (c), effective July 29, 1995.

Effect of Amendments. — Session Laws 1995, c. 186, ss. 2 and 3, effective October 1, 1995, added subdivision (c)3a.; in subsection (e) added subdivisions (e)1. and (e)4., redesignated former subdivisions (e)01., (e)1., (e)1a., (e)1b., and (e)2. as subdivisions (e)2., (e)3., (e)5., (e)6., and (e)7., and rewrote present subdivision (e)6.

§ 90-90. Schedule II controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a high potential for abuse; currently accepted medical use in the United States, or currently accepted medical use with severe restrictions; and the abuse of the substance may lead to severe psychic or physical dependence. The following controlled substances are included in this schedule:

(a) Any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, unless specifically excepted or unless listed in another schedule:

1. Opium and opiate, and any salt, compound, derivative, or preparation of opium and opiate, excluding apomorphine, thebaine derived butorphanol, nalbuphine, dextrorphan, naloxone, naltrexone and nalmefene, and their respective salts, but including the following:
    (i) Raw opium.
    (ii) Opium extracts.
    (iii) Opium fluid extracts.
    (iv) Powdered opium.
    (v) Granulated opium.
    (vi) Tincture of opium.
    (vii) Codeine.
    (viii) Ethylmorphine.
    (ix) Etorphine hydrochloride.
    (x) Hydrocodone.
    (xi) Hydromorphone.
    (xii) Metopon.
    (xiii) Morphine.
    (xiv) Oxycodone.
    (xv) Oxymorphone.
    (xvi) Thebaine.
2. Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph 1 of this subdivision, except that these substances shall not include the isoquinoline alkaloids of opium.
3. Opium poppy and poppy straw.
4. Cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative, or preparation thereof

which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocanized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine.

5. Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation unless specifically exempted or listed in other schedules:

01. Alfentanil.
1. Alphaprodine.
2. Anileridine.
3. Bezitramide.
3a. Carfentanil.
4. Dihydrocodeine.
5. Diphenoxylate.
6. Fentanyl.
7. Isomethadone.
7a. Levo-alphacetylmethadol. Some trade or other names: levo-alpha-acetylmethadol, levomethadyl acetate, or LAAM.
8. Levomethorphan.
9. Levorphanol.
10. Metazocine.
11. Methadone.
12. Methadone — Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane.
13. Moramide — Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl-propane-carboxylic acid.
14. Pethidine.
15. Pethidine — Intermediate — A, 4-cyano-1-methyl-4-phenylpiperidine.
16. Pethidine — Intermediate — B, ethyl-4-phenylpiperidine-4-carboxylate.
17. Pethidine — Intermediate — C, 1-methyl-4-phenylpiperidine-4-carboxylic acid.
18. Phenazocine.
19. Piminodine.
20. Racemethorphan.
21. Racemorphan.
22. Sufentanil.

(c) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a stimulant effect on the central nervous system unless specifically exempted or listed in another schedule:

1. Amphetamine, its salts, optical isomers, and salts of its optical isomers.
2. Phenmetrazine and its salts.
3. Methamphetamine, including its salts, isomers, and salts of isomers.
4. Methylphenidate.
5. Phenylacetone. Some trade or other names: Phenyl-2-propanone; P2P; benzyl methyl ketone; methyl benzyl ketone.

(d) Any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation, unless specifically exempted by the Commission or listed in another schedule:

1. Amobarbital
1a. Glutethimide
2. Repealed by Session Laws 1983, c. 695, s. 2.
3. Pentobarbital
4. Phencyclidine
5. Phencyclidine immediate precursors:
   a. 1-Phenylcyclohexylamine
   b. 1-Piperidinocyclohexanecarbonitrile (PCC)
6. Secobarbital.

(e) Any material, compound, mixture, or preparation which contains any quantity of the following hallucinogenic substances, including their salts, isomers, and salts of isomers, unless specifically excepted, or listed in another schedule, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in a U.S. Food and Drug Administration approved drug product. [Some other names:(6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo[b,d] pyra n-1-o1, or (-)-delta-9-(trans)-tetrahydrocannabinol].
2. Nabilone [Another name for nabilone: (+/-)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one]. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 540, s. 6; c. 1358, ss. 6, 15; 1975, c. 443, s. 2; 1977, c. 667, s. 3; c. 891, s. 2; 1979, c. 434, s. 2; 1981, c. 51, s. 9; 1983, c. 695, s. 2; 1985, c. 172, ss. 4, 5; 1987, c. 105, s. 3; c. 412, ss. 5A-7; 1989 (Reg. Sess., 1990), c. 1040, s. 2; 1993, c. 319, ss. 3, 4; 1995, c. 186, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added subdivision (b)7a.

CASE NOTES

Typographical Error in Affidavit. — Although affidavit in support of search warrant made a single reference to the "the Schedule II controlled substance marijuana" instead of cocaine, the trial court determined this was a typographical error and the warrant was still valid. State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

§ 90-92. Schedule IV controlled substances.

This schedule includes the controlled substances listed or to be listed by whatever official name, common or usual name, chemical name, or trade name designated. In determining that a substance comes within this schedule, the Commission shall find: a low potential for abuse relative to the substances listed in Schedule III of this Article; currently accepted medical use in the United States;

and limited physical or pyschological dependence relative to the substances listed in Schedule III of this Article. The following controlled substances are included in this schedule:

(a) Depressants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Alprazolam.
2. Barbital.
3. Bromazepam.
4. Camazepam.
5. Chloral betaine.
6. Chloral hydrate.
7. Chlordiazepoxide.
8. Clobazam.
9. Clonazepam.
10. Clorazepate.
11. Clotiazepam.
12. Cloxazolam.
13. Delorazepam.
14. Diazepam.
15. Estazolam.
16. Ethchlorvynol.
17. Ethinamate.
18. Ethyl loflazepate.
19. Fludiazepam.
20. Flunitrazepam.
21. Flurazepam.
22. Halazepam.
23. Haloxazolam.
24. Ketazolam.
25. Loprazolam.
26. Lorazepam.
27. Lormetazepam.
28. Mebutamate.
29. Medazepam.
30. Meprobamate.
31. Methohexital.
32. Methylphenobarbital (mephobarbital).
33. Midazolam.
34. Nimetazepam.
35. Nitrazepam.
36. Nordiazepam.
37. Oxazepam.
38. Oxazolam.
39. Paraldehyde.
40. Petrichloral.
41. Phenobarbital.
42. Pinazepam.
43. Prazepam.
44. Quazepam.
45. Temazepam.
46. Tetrazepam.
47. Triazolam.
48. Zolpidem.

(b) The Commission may by regulation except any compound, mixture, or preparation containing any stimulant or depressant substance listed in this schedule from the application of all or any part of this Article if the compound, mixture, or preparation contains one or more active, nonnarcotic, medicinal ingredients not having a stimulant or depressant effect on the central nervous system; provided, that such admixtures shall be included therein in such combinations, quantity, proportion, or concentration as to vitiate the potential for abuse of the substances which do have a stimulant or depressant effect on the central nervous system.

(c) Any material, compound, mixture, or preparation which contains any of the following substances, including its salts, or isomers and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

1. Fenfluramine.
2. Pentazocine.

(d) Stimulants. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

1. Diethylpropion.
1a. Mazindol.
2. Pemoline (including organometallic complexes and chelates thereof).
3. Phentermine.

(e) Other Substances. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

1. Dextropropoxyphene (Alpha-(plus)-4-dimethylamino-1, 2-diphenyl-3-methyl-2-propionoxybutane).
2. Pipradrol.
3. SPA ((-)-1-dimethylamino-1, 2-diphenylethane).

(f) Narcotic Drugs. — Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

1. Not more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.
2. Buprenorphine. (1971, c. 919, s. 1; 1973, c. 476, s. 128; c. 1358, ss. 8, 15; c. 1446, s. 5; 1975, cc. 401, 819; 1977, c. 667, s. 3; c. 891, s. 3; 1979, c. 434, ss. 4-6; 1981, c. 51, s. 9; 1985, c. 172, ss. 6-8; 439, s. 1; 1987, c. 412, ss. 11, 12; 1993, c. 319, s. 6; 1995, c. 509, s. 38.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "(Alpha -(plus)- 4-dimethylamino-1" for "(Alpha-(plus)- 4-dimethiamino-1" in subdivision (e)(1).

§ 90-94. Schedule VI controlled substances.

CASE NOTES

Cited in State v. Ledbetter, 120 N.C. App. 117, 461 S.E.2d 341 (1995).

§ 90-95. Violations; penalties.

(a) Except as authorized by this Article, it is unlawful for any person:

(1) To manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance;

(2) To create, sell or deliver, or possess with intent to sell or deliver, a counterfeit controlled substance;

(3) To possess a controlled substance.

(b) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(1) with respect to:

(1) A controlled substance classified in Schedule I or II shall be punished as a Class H felon;

(2) A controlled substance classified in Schedule III, IV, V, or VI shall be punished as a Class I felon, but the transfer of less than 5 grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(c) Any person who violates G.S. 90-95(a)(2) shall be punished as a Class I felon.

(d) Except as provided in subsections (h) and (i) of this section, any person who violates G.S. 90-95(a)(3) with respect to:

(1) A controlled substance classified in Schedule I shall be punished as a Class I felon;

(2) A controlled substance classified in Schedule II, III, or IV shall be guilty of a Class 1 misdemeanor. If the controlled substance exceeds four tablets, capsules, or other dosage units or equivalent quantity of hydromorphone or if the quantity of the controlled substance, or combination of the controlled substances, exceeds one hundred tablets, capsules or other dosage units, or equivalent quantity, the violation shall be punishable as a Class I felony. If the controlled substance is phencyclidine, or cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, or any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocanized coca leaves or any extraction of coca leaves which does not contain cocaine or ecgonine), the violation shall be punishable as a Class I felony.

(3) A controlled substance classified in Schedule V shall be guilty of a Class 2 misdemeanor;

(4) A controlled substance classified in Schedule VI shall be guilty of a Class 3 misdemeanor, but any sentence of imprisonment imposed must be suspended and the judge may not require at the time of sentencing that the defendant serve a period of imprisonment as a special condition of probation. If the quantity of the controlled substance

exceeds one-half of an ounce (avoirdupois) of marijuana or one-twentieth of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, the violation shall be punishable as a Class 1 misdemeanor. If the quantity of the controlled substance exceeds one and one-half ounces (avoirdupois) of marijuana or three-twentieths of an ounce (avoirdupois) of the extracted resin of marijuana, commonly known as hashish, or if the controlled substance consists of any quantity of synthetic tetrahydrocannabinols or tetrahydrocannabinols isolated from the resin of marijuana, the violation shall be punishable as a Class I felony.

(d1) Except as authorized by this Article, it is unlawful for any person to:

(1) Possess an immediate precursor chemical with intent to manufacture a controlled substance; or

(2) Possess or distribute an immediate precursor chemical knowing, or having reasonable cause to believe, that the immediate precursor chemical will be used to manufacture a controlled substance.

Any person who violates this subsection shall be punished as a Class H felon.

(d2) The immediate precursor chemicals to which subsection (d1) of this section applies are those immediate precursor chemicals designated by the Commission pursuant to its authority under G.S. 90-88, and the following (until otherwise specified by the Commission):

(1) Anthranilic acid.
(2) Benzyl cyanide.
(3) Chloroephedrine.
(4) Chloropseudoephedrine.
(5) D-lysergic acid.
(6) Ephedrine.
(7) Ergonovine maleate.
(8) Ergotamine tartrate.
(9) Ethyl Malonate.
(10) Ethylamine.
(11) Isosafrole.
(12) Malonic acid.
(13) Methylamine.
(14) N-acetylanthranilic acid.
(15) N-ethylephedrine.
(16) N-ethylepseudoephedrine.
(17) N-methylephedrine.
(18) N-methylpseudoephedrine.
(19) Norpseudoephedrine.
(20) Phenyl-2-propane.
(21) Phenylacetic acid.
(22) Phenylpropanolamine.
(23) Piperidine.
(24) Piperonal.
(25) Propionic anhydride.
(26) Pseudoephedrine.
(27) Pyrrolidine.
(28) Safrole.
(29) Thionylchloride.

(e) The prescribed punishment and degree of any offense under this Article shall be subject to the following conditions, but the punishment for an offense may be increased only by the maximum authorized under any one of the applicable conditions:

(1), (2) Repealed by Session Laws 1979, c. 760, s. 5.

(3) If any person commits a Class 1 misdemeanor under this Article and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be punished as a Class I felon. The prior conviction used to raise the current offense to a Class I felony shall not be used to calculate the prior record level;

(4) If any person commits a Class 2 misdemeanor, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 1 misdemeanor. The prior conviction used to raise the current offense to a Class 1 misdemeanor shall not be used to calculate the prior conviction level;

(5) Any person 18 years of age or over who violates G.S. 90-95(a)(1) by selling or delivering a controlled substance to a person under 16 years of age or a pregnant female shall be punished as a Class D felon. Mistake of age is not a defense to a prosecution under this section. It shall not be a defense that the defendant did not know that the recipient was pregnant;

(6) For the purpose of increasing punishment under G.S. 90-95(e)(3) and (e)(4), previous convictions for offenses shall be counted by the number of separate trials at which final convictions were obtained and not by the number of charges at a single trial;

(7) If any person commits an offense under this Article for which the prescribed punishment requires that any sentence of imprisonment be suspended, and if he has previously been convicted for one or more offenses under any law of North Carolina or any law of the United States or any other state, which offenses are punishable under any provision of this Article, he shall be guilty of a Class 2 misdemeanor;

(8) Any person 21 years of age or older who commits an offense under G.S. 90-95(a)(1) on property used for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school shall be punished as a Class E felon. For purposes of this subdivision, the transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

(9) Any person who violates G.S. 90-95(a)(3) on the premises of a penal institution or local confinement facility shall be guilty of a Class I felony.

(f) Any person convicted of an offense or offenses under this Article who is sentenced to an active term of imprisonment that is less than the maximum active term that could have been imposed may, in addition, be sentenced to a term of special probation. Except as indicated in this subsection, the administration of special probation shall be the same as probation. The conditions of special probation shall be fixed in the same manner as probation, and the conditions may include requirements for rehabilitation treatment. Special probation shall follow the active sentence. No term of special probation shall exceed five years. Special probation may be revoked in the same manner as probation; upon revocation, the original term of imprisonment may be increased by no more than the difference between the active term of imprisonment actually served and the maximum active term that could have been imposed at trial for the offense or offenses for which the person was convicted, and the resulting term of imprisonment need not be diminished by the time spent on special probation.

(g) Whenever matter is submitted to the North Carolina State Bureau of Investigation Laboratory, the Charlotte, North Carolina, Police Department Laboratory or to the Toxicology Laboratory, Reynolds Health Center, Winston-Salem for chemical analysis to determine if the matter is or contains a controlled substance, the report of that analysis certified to upon a form approved by the Attorney General by the person performing the analysis shall be admissible without further authentication in all proceedings in the district court division of the General Court of Justice as evidence of the identity, nature, and quantity of the matter analyzed.

(h) Notwithstanding any other provision of law, the following provisions apply except as otherwise provided in this Article.

(1) Any person who sells, manufactures, delivers, transports, or possesses in excess of 50 pounds (avoirdupois) of marijuana shall be guilty of a felony which felony shall be known as "trafficking in marijuana" and if the quantity of such substance involved:
   a. Is in excess of 50 pounds, but less than 100 pounds, such person shall be punished as a Class H felon and shall be sentenced to a minimum term of 25 months and a maximum term of 30 months in the State's prison and shall be fined not less than five thousand dollars ($5,000);
   b. Is 100 pounds or more, but less than 2,000 pounds, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);
   c. Is 2,000 pounds or more, but less than 10,000 pounds, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);
   d. Is 10,000 pounds or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(2) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of methaqualone, or any

mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in methaqualone" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of cocaine and any salt, isomer, salts of isomers, compound, derivative, or preparation thereof, or any coca leaves and any salt, isomer, salts of isomers, compound, derivative, or preparation of coca leaves, and any salt, isomer, salts of isomers, compound, derivative or preparation thereof which is chemically equivalent or identical with any of these substances (except decocainized coca leaves or any extraction of coca leaves which does not contain cocaine) or any mixture containing such substances, shall be guilty of a felony, which felony shall be known as "trafficking in cocaine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(3a) Any person who sells, manufactures, delivers, transports, or possesses 1,000 tablets, capsules or other dosage units, or the equivalent quantity, or more of amphetamine, its salts, optical isomers, and salts of its optical isomers or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in amphetamine" and if the quantity of such substance or mixture involved:

a. Is 1,000 or more dosage units, or equivalent quantity, but less than 5,000 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 5,000 or more dosage units, or equivalent quantity, but less than 10,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 10,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(3b) Any person who sells, manufactures, delivers, transports, or possesses 28 grams or more of methamphetamine shall be guilty of a felony which felony shall be known as "trafficking in methamphetamine" and if the quantity of such substance or mixture involved:

a. Is 28 grams or more, but less than 200 grams, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 200 grams or more, but less than 400 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 400 grams or more, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined at least two hundred fifty thousand dollars ($250,000).

(4) Any person who sells, manufactures, delivers, transports, or possesses four grams or more of opium or opiate, or any salt, compound, derivative, or preparation of opium or opiate (except apomorphine, nalbuphine, analoxone and naltrexone and their respective salts), including heroin, or any mixture containing such substance, shall be guilty of a felony which felony shall be known as "trafficking in opium or heroin" and if the quantity of such controlled substance or mixture involved:

a. Is four grams or more, but less than 14 grams, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

b. Is 14 grams or more, but less than 28 grams, such person shall be punished as a Class E felon and shall be sentenced to a minimum term of 90 months and a maximum term of 117 months in the State's prison and shall be fined not less than one hundred thousand dollars ($100,000);

c. Is 28 grams or more, such person shall be punished as a Class C felon and shall be sentenced to a minimum term of 225 months and a maximum term of 279 months in the State's prison and shall be fined not less than five hundred thousand dollars ($500,000).

(4a) Any person who sells, manufactures, delivers, transports, or possesses 100 tablets, capsules, or other dosage units, or the equivalent quantity, or more, of Lysergic Acid Diethylamide, or any mixture containing such substance, shall be guilty of a felony, which felony shall be known as "trafficking in Lysergic Acid Diethylamide". If the quantity of such substance or mixture involved:

a. Is 100 or more dosage units, or equivalent quantity, but less than 500 dosage units, or equivalent quantity, such person shall be punished as a Class G felon and shall be sentenced to a minimum term of 35 months and a maximum term of 42 months in the State's prison and shall be fined not less than twenty-five thousand dollars ($25,000);

b. Is 500 or more dosage units, or equivalent quantity, but less than 1,000 dosage units, or equivalent quantity, such person shall be punished as a Class F felon and shall be sentenced to a minimum term of 70 months and a maximum term of 84 months in the State's prison and shall be fined not less than fifty thousand dollars ($50,000);

c. Is 1,000 or more dosage units, or equivalent quantity, such person shall be punished as a Class D felon and shall be sentenced to a minimum term of 175 months and a maximum term of 219 months in the State's prison and shall be fined not less than two hundred thousand dollars ($200,000).

(5) Except as provided in this subdivision, a person being sentenced under this subsection may not receive a suspended sentence or be placed on probation. The sentencing judge may reduce the fine, or impose a prison term less than the applicable minimum prison term provided by this subsection, or suspend the prison term imposed and place a person on probation when such person has, to the best of his knowledge, provided substantial assistance in the identification, arrest, or conviction of any accomplices, accessories, co-conspirators, or principals if the sentencing judge enters in the record a finding that the person to be sentenced has rendered such substantial assistance.

(6) Sentences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder.

(i) The penalties provided in subsection (h) of this section shall also apply to any person who is convicted of conspiracy to commit any of the offenses described in subsection (h) of this section. (1971, c. 919, s. 1; 1973, c. 654, s. 1; c. 1078; c. 1358, s. 10; 1975, c. 360, s. 2; 1977, c. 862, ss. 1, 2; 1979, c. 760, s. 5; 1979, 2nd Sess., c. 1251, ss. 4-7; 1983, c. 18; c. 294, s. 6; c. 414; 1985, c. 569, s. 1; c. 675, ss. 1, 2; 1987, c. 90; c. 105, ss. 4, 5; c. 640, ss. 1, 2; c. 783, s. 4; 1989, c. 641; c. 672; c. 690; c. 770, s. 68; 1989 (Reg. Sess., 1990), c. 1024, s. 17; c. 1039, s. 5; c. 1081, s. 2; 1991, c. 484, s. 1; 1993, c. 538, s. 30; c. 539, s. 1358.1; 1994, Ex. Sess., c. 11, s. 1; c. 14, ss. 46, 47; c. 24, s. 14(b); 1996, 2nd Ex. Sess., c. 18, s. 20.13(c).)

Editor's Note. —

Session Laws 1993, c. 538, which amended this section, in s. 56, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(b), provides: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, ss. 46 and 47, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective January 1, 1997, and applicable to offenses committed on or after that date, substituted "Class D felon" for "Class E felon" in subdivision (e)(5).

CASE NOTES

I. General Consideration.
IV. Possession.
  A. In General.
  B. Possession with Intent to Sell or Deliver.
V. Trafficking.

I. GENERAL CONSIDERATION.

Double Jeopardy. —

Defendant's consecutive sentences for trafficking by sale and trafficking by delivery do not violate double jeopardy as they are separate offenses. State v. Holmes, 120 N.C. App. 54, 460 S.E.2d 915 (1995).

Double Jeopardy Not Violated for Conviction for Failure to Pay Excise Tax. — Convictions for trafficking in cocaine by possession and for failure to pay excise tax on the controlled substance did not constitute double jeopardy, nor did the punishments imposed upon those convictions violate the prohibition against multiple punishments for the same offense, where the state sought to collect the drug excise tax from defendant in the same prosecution, and where neither of the crimes in question was a lesser included offense of the other. State v. Morgan, 118 N.C. App. 461, 455 S.E.2d 490 (1995).

Weight of Marijuana. — The state, in order to prove the element of weight of the marijuana in question, must either offer evidence of its actual, measured weight or demonstrate that the quantity of marijuana itself is so large as to permit a reasonable inference that its weight satisfied this element. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Unlike age, the weight of a given quantity of marijuana is not a matter of general knowledge and experience. This is a matter familiar only to those who regularly use or deal in the substance, who are engaged in enforcing the laws against it, or who have developed an acute ability to assess the weight of objects down to the ounce and the average juror does not fall into any of these categories. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Drug Purchases Within 300 Feet of School. —

There was plenary evidence that the drug sale, for which defendant was charged, took place within 300 feet of a school boundary in violation of subdivision (e)(8). State v. Alston, 111 N.C. App. 416, 432 S.E.2d 385 (1993).

Applied in State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993); State v. Baker, 112 N.C. App. 410, 435 S.E.2d 812 (1993).

Stated in State v. Oakes, 113 N.C. App. 332, 438 S.E.2d 477 (1994).

Cited in State v. Farris, 111 N.C. App. 254, 431 S.E.2d 803 (1993); State v. Beveridge, 112 N.C. App. 688, 436 S.E.2d 912 (1993); United States v. D'Anjou, 16 F.3d 604 (4th Cir. 1994); State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994); State v. Harris, 115 N.C. App. 42, 444 S.E.2d 226 (1994); State v. Hauser, 115 N.C. App. 431, 445 S.E.2d 73 (1994); Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); State v. Taylor, 117 N.C. App. 644, 453 S.E.2d 225 (1995); State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (1995).

IV. POSSESSION.

A. In General.

Constructive Possession in Vehicle. — If a defendant possesses a controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If a vehicle contains a controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Chain of Custody. — Mere weakness in the chain of custody speaks only to the weight of the evidence, not its admissibility. State v. Carr, 122 N.C. App. 369, 470 S.E.2d 70 (1996).

B. Possession with Intent to Sell or Deliver.

Evidence Sufficient to Establish Intent. —

Evidence was sufficient to establish constructive possession and intent to sell. State v. Carr, 122 N.C. App. 369, 470 S.E.2d 70 (1996).

V. TRAFFICKING.

Trafficking by possession, etc. —

Sale, manufacture, delivery, transportation, and possession of 28 grams or more of cocaine as defined under subdivision (h)(3) are separate trafficking offenses for which a defendant may be separately convicted and punished. State v. Garcia, 111 N.C. App. 636, 433 S.E.2d 187 (1993).

"Substantial" Movement Shown. — Where defendant removed drugs from a dwelling house and carried them to a car which he used to leave the premises, such movement was "substantial" and sufficient to sustain the charge of trafficking by transporting in violation of subdivision (h)(3) of this section. Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Mgt. Auth., 110 N.C. App. 607, 430 S.E.2d 441, cert. denied, 334 N.C. 625, 435 S.E.2d 347 (1993).

Evidence held sufficient, etc. —

Evidence was sufficient to support finding as an aggravating factor that defendant induced others to participate in the trafficking of cocaine. State v. Smallwood, 112 N.C. App. 76, 434 S.E.2d 615 (1993).

Evidence Not Probative of Trafficking. — Where defendant was charged with trafficking in cocaine, the mere ownership of a passport showing travel to Colombia was not probative of a fact at issue in the case. State v. Cuevas, 121 N.C. App. 553, 468 S.E.2d 425 (1996).

Single Sentence for Multiple Courts. — Although defendant was charged with three counts of trafficking in cocaine, only a single minimum sentence of seven years was mandated by the language of subdivision (h)(6). State v. Bozeman, 115 N.C. App. 658, 446 S.E.2d 140 (1994).

§ 90-96. Conditional discharge and expunction of records for first offense.

(a) Whenever any person who has not previously been convicted of any offense under this Article or under any statute of the United States or any state relating to those substances included in Article 5 or 5A of Chapter 90 or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or is found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place him on probation upon such reasonable terms and conditions as it may require. Notwithstanding the provisions of G.S. 15A-1342(c) or any other statute or law, probation may be imposed under this section for an offense under this Article for which the prescribed punishment includes only a fine. To fulfill the terms and conditions of probation the court may allow the defendant to participate in a drug education program approved for this purpose by the Department of Human Resources. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge such person and dismiss the proceedings against him. Discharge and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions under this Article. Discharge and dismissal under this section or G.S. 90-113.14 may occur only once with respect to any person. Disposition of a case to determine discharge and dismissal under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal. Prior to taking any action to discharge and dismiss under this section the court shall make a finding that the defendant has no record of previous convictions under the "North Carolina Controlled Substances Act", Article 5, Chapter 90, the "North Carolina Toxic Vapors Act", Article 5A, Chapter 90, or the "Drug Paraphernalia Act", Article 5B, Chapter 90.

(a1) Upon the first conviction only of any offense included in G.S. 90-95(a)(3) or G.S. 90-113.21 and subject to the provisions of this subsection (a1), the court may place defendant on probation under this section for an offense under this Article including an offense for which the prescribed punishment includes only a fine. The probation, if imposed, shall be for not less than one year and shall contain a minimum condition that the defendant who was found guilty or pleads guilty enroll in and successfully complete, within 150 days of the date of the imposition of said probation, the program of instruction at the drug education school approved by the Department of Human Resources pursuant to G.S. 90-96.01. The court may impose probation that does not contain a condition that defendant successfully complete the program of instruction at a drug education school if:

(1) There is no drug education school within a reasonable distance of the defendant's residence; or

(2) There are specific, extenuating circumstances which make it likely that defendant will not benefit from the program of instruction.

The court shall enter such specific findings in the record; provided that in the case of subdivision (2) above, such findings shall include the specific, extenuating circumstances which make it likely that the defendant will not benefit from the program of instruction.

For the purposes of determining whether the conviction is a first conviction or whether a person has already had discharge and dismissal, no prior offense occurring more than seven years before the date of the current offense shall be considered. In addition, convictions for violations of a provision of G.S. 90-95(a)(1) or 90-95(a)(2) or 90-95(a)(3), or 90-113.10, or 90-113.11, or 90-113.12, or 90-113.21 shall be considered previous convictions.

Failure to complete successfully an approved program of instruction at a drug education school shall constitute grounds to revoke probation and deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. For purposes of this subsection, the phrase "failure to complete successfully the prescribed program of instruction at a drug education school" includes failure to attend scheduled classes without a valid excuse, failure to complete the course within 150 days of imposition of probation, willful failure to pay the required fee for the course, or any other manner in which the person fails to complete the course successfully. The instructor of the course to which a person is assigned shall report any failure of a person to complete successfully the program of instruction to the court which imposed probation. Upon receipt of the instructor's report that the person failed to complete the program successfully, the court shall revoke probation and/or deny application for expunction of all recordation of defendant's arrest, indictment, or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. A person may obtain a hearing before the court of original jurisdiction prior to revocation of probation or denial of application for expunction.

This subsection is supplemental and in addition to existing law and shall not be construed so as to repeal any existing provision contained in the General Statutes of North Carolina.

(b) Upon the dismissal of such person, and discharge of the proceedings against him under subsection (a) of this section, such person, if he were not over 21 years of age at the time of the offense, may apply to the court for an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to his arrest, indictment or information, trial, finding of guilty, and dismissal and discharge pursuant to this section. The applicant shall attach to the application the following:

(1) An affidavit by the applicant that he has been of good behavior during the period of probation since the decision to defer further proceedings on the offense in question and has not been convicted of any felony, or misdemeanor, other

than a traffic violation, under the laws of the United States or the laws of this State or any other state;

(2) Verified affidavits by two persons who are not related to the applicant or to each other by blood or marriage, that they know the character and reputation of the petitioner in the community in which he lives, and that his character and reputation are good;

(3) Affidavits of the clerk of superior court, chief of police, where appropriate, and sheriff of the county in which the petitioner was convicted, and, if different, the county of which the petitioner is a resident, showing that the applicant has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to the conviction for the offense in question or during the period of probation following the decision to defer further proceedings on the offense in question.

The judge to whom the petition is presented is authorized to call upon a probation officer for any additional investigation or verification of the petitioner's conduct during the probationary period deemed desirable.

If the court determines, after hearing, that such person was dismissed and the proceedings against him discharged and that he was not over 21 years of age at the time of the offense, it shall enter such order. The effect of such order shall be to restore such person in the contemplation of the law to the status he occupied before such arrest or indictment or information. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

The court shall also order that said conviction and the records relating thereto be expunged from the records of the court, and direct all law-enforcement agencies bearing records of the same to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police or other arresting agency, as appropriate, and the sheriff, chief of police or other arresting agency, as appropriate, shall forward such order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

(c) The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons granted a conditional discharge under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons granted conditional discharges. The information contained in the file shall be disclosed only to Judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted a conditional discharge.

(d) Whenever any person is charged with a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article or a felony under G.S.

90-95(a)(3) by possessing less than one gram of cocaine, upon dismissal by the State of the charges against him, upon entry of a nolle prosequi, or upon a finding of not guilty or other adjudication of innocence, such person may apply to the court for an order to expunge from all official records all recordation relating to his arrest, indictment or information, or trial. If the court determines, after hearing that such person was not over 21 years of age at the time any of the proceedings against him occurred, it shall enter such order. No person as to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made of him for any purpose.

(e) Whenever any person who has not previously been convicted of an offense under this Article or under any statute of the United States or any state relating to controlled substances included in any schedule of this Article or to that paraphernalia included in Article 5B of Chapter 90 pleads guilty to or has been found guilty of (i) a misdemeanor under this Article by possessing a controlled substance included within Schedules II through VI of this Article, or by possessing drug paraphernalia as prohibited by G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) by possessing less than one gram of cocaine, the court may, upon application of the person not sooner than 12 months after conviction, order cancellation of the judgment of conviction and expunction of the records of his arrest, indictment, or information, trial and conviction. A conviction in which the judgment of conviction has been canceled and the records expunged pursuant to this section shall not be thereafter deemed a conviction for purposes of this section or for purposes of disqualifications or liabilities imposed by law upon conviction of a crime including the additional penalties imposed for second or subsequent convictions of this Article. Cancellation and expunction under this section may occur only once with respect to any person. Disposition of a case under this section at the district court division of the General Court of Justice shall be final for the purpose of appeal.

The granting of an application filed under this section shall cause the issue of an order to expunge from all official records (other than the confidential file to be retained by the Administrative Office of the Courts under subsection (c)) all recordation relating to the petitioner's arrest, indictment, or information, trial, finding of guilty, judgment of conviction, cancellation of the judgment, and expunction of records pursuant to this section.

The judge to whom the petition is presented is authorized to call upon a probation officer for additional investigation or verification of the petitioner's conduct since conviction. If the court determines that the petitioner was convicted of (i) a misdemeanor under this Article for possessing a controlled substance included within Schedules II through VI of this Article, or for possessing drug paraphernalia as prohibited in G.S. 90-113.21, or (ii) a felony under G.S. 90-95(a)(3) for possession of less than one gram of cocaine, that he was not over 21 years of age at the time of the offense, that he has been of good behavior since his conviction, that he has successfully completed a drug education program approved for this purpose by the Department of Human Resources, and that he has not been convicted of a felony or misdemeanor other than a traffic violation under the laws of this State at any time prior to or since the conviction for the offense in question, it shall enter an order of expunction of the petitioner's court record. The effect of such order shall be to restore the petitioner in the contemplation of the law to the status he occupied before arrest or indictment or information or conviction. No person as to whom such order was entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of his failures to recite or acknowledge such arrest, or indictment or information, or conviction, or trial in response to any inquiry made of him for any purpose. The judge may waive the condition that the petitioner attend the drug education school if the judge makes a specific finding that there was no drug education school within a reasonable distance of the defendant's residence or that there were specific extenuating circumstances which made it likely that the petitioner would not benefit from the program of instruction.

The court shall also order that all law-enforcement agencies bearing records of the conviction and records relating thereto to expunge their records of the conviction. The clerk shall forward a certified copy of the order to the sheriff, chief of police, or other arresting agency, as appropriate, and the arresting agency shall forward the order to the State Bureau of Investigation with a form supplied by the State Bureau of Investigation. The State Bureau of Investigation shall forward the court order in like manner to the Federal Bureau of Investigation.

The clerk of superior court in each county in North Carolina shall, as soon as practicable after each term of court in his county, file with the Administrative Office of the Courts the names of those persons whose judgments of convictions have been canceled and expunged under the provisions of this Article, and the Administrative Office of the Courts shall maintain a confidential file containing the names of persons whose judgments of convictions have been canceled and expunged. The information contained in the file shall be disclosed only to judges of the General Court of Justice of North Carolina for the purpose of ascertaining whether any person charged with an offense under this Article has been previously granted cancellation and expunction of a judgment of conviction pursuant to the terms of this Article. (1971, c. 919, s. 1; 1973, c. 654, s. 2; c. 1066; 1977, 2nd Sess., c. 1147, s. 11B; 1979, c. 431, ss. 3, 4; c. 550; 1981, c. 922, ss. 1-4; 1994, Ex. Sess., c. 11, s. 1.1.)

CASE NOTES

Cited in Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994).

§ 90-98. Attempt and conspiracy; penalties.

CASE NOTES

Cited in State v. Williamson, 110 N.C. App. 626, 430 S.E.2d 467 (1993).

§ 90-101. Annual registration and fee to engage in listed activities with controlled substances; effect of registration; exceptions; waiver; inspection.

(a) Every person who manufactures, distributes, dispenses, or conducts research with any controlled substance within this State or who proposes to engage in any of these activities shall annually register with the North Carolina Department of Human Resources, in accordance with rules adopted by the Commission, and shall pay the registration fee set by the Commission for the category to which the applicant belongs. An applicant for registration shall file an application for registration with the Department of Human Resources and submit the required fee with the application. The categories of applicants and the maximum fee for each category are as follows:

CATEGORY	MAXIMUM FEE
Clinic	$150.00
Hospital	350.00
Nursing Home	150.00
Teaching Institution	150.00
Researcher	150.00
Analytical Laboratory	150.00
Distributor	600.00
Manufacturer	700.00.

(b) Persons registered by the North Carolina Department of Human Resources under this Article (including research facilities) to manufacture, distribute, dispense or conduct research with controlled substances may possess, manufacture, distribute, dispense or conduct research with those substances to the extent authorized by their registration and in conformity with the other provisions of this Article.

(c) The following persons shall not be required to register and may lawfully possess controlled substances under the provisions of this Article:

(1) An agent, or an employee thereof, of any registered manufacturer, distributor, or dispenser of any controlled substance if such agent is acting in the usual course of his business or employment;

(2) The State courier service operated by the Department of Administration, a common or contract carrier, or a public warehouseman, or an employee thereof, whose possession of any controlled substance is in the usual course of his business or employment;

(3) An ultimate user or a person in possession of any controlled substance pursuant to a lawful order of a practitioner;

(4) Repealed by Session Laws 1977, c. 891, s. 4.

(5) Any law-enforcement officer acting within the course and scope of official duties, or any person employed in an official capacity by, or acting as an agent of, any law-enforcement agency or other agency charged with enforcing the provisions of this Article when acting within the course and scope of official duties; and

(6) A practitioner, as defined in G.S. 90-87(22)a., who is required to be licensed in North Carolina by his respective licensing board.

(d) The Commission may, by rule, waive the requirement for registration of certain classes of manufacturers, distributors, or dispensers if it finds it consistent with the public health and safety.

(e) A separate registration shall be required at each principal place of business, research or professional practice where the registrant manufactures, distributes, dispenses or uses controlled substances.

(f) The North Carolina Department of Human Resources is authorized to inspect the establishment of a registrant, applicant for registration, or practitioner in accordance with rules adopted by the Commission.

(g) Practitioners licensed in North Carolina by their respective licensing boards may possess, dispense or administer controlled substances to the extent authorized by law and by their boards.

(h) A physician licensed by the North Carolina Medical Board pursuant to Article 1 of this Chapter may possess, dispense or administer tetrahydrocannabinols in duly constituted pharmaceutical form for human administration for treatment purposes pursuant to rules adopted by the Commission.

(i) A physician licensed by the North Carolina Medical Board pursuant to Article 1 of this Chapter may dispense or administer Dronabinol or Nabilone as scheduled in G.S. 90-90(e) only as an antiemetic agent in cancer chemotherapy. (1971, c. 919, s. 1; 1973, c. 1358, s. 12; 1977, c. 667, s. 3; c. 891, s. 4; 1979, c. 781; 1981, c. 51, s. 9; 1983, c. 375, s. 2; 1985, c. 439, s. 2; 1987, c. 412, s. 13; 1989 (Reg. Sess., 1990), c. 1040, s. 4; 1993, c. 384, s. 2; 1995, c. 94, ss. 26, 27.)

Effect of Amendments. — Session Laws 1995, c. 94, ss. 26 and 27, effective May 22, 1995, substituted “North Carolina Medical Board” for “Board of Medical Examiners” in subsections (h) and (i).

§ 90-108. Prohibited acts; penalties.

Editor’s Note. —
Session Laws 1993, c. 539, s. 622, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: “This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions.”

CASE NOTES

Maintaining Dwelling Used for Controlled Substances. —
Evidence was sufficient to support charge where defendant possessed a key to a house and used it to go in and out of the house, inside the master bedroom a letter was found addressed to defendant at that address, scales and baking soda were located in the kitchen of the house, a package of cocaine was addressed to defendant and defendant also listed the house address as his address after he was arrested. State v. Kelly, 120 N.C. App. 821, 463 S.E.2d 812 (1995).

Maintaining Vehicle — Evidence Held Insufficient. — Where the evidence indicated that defendant possessed marijuana while in his car, and that on the following day drug paraphernalia were found at defendant’s home, and authorities found one marijuana cigarette in defendant’s car and two marijuana cigarettes at defendant’s home, the evidence was insufficient to establish that defendant's vehicle was "used for the keeping or selling of" a controlled substance. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Constructive Possession in Vehicle. — If a defendant possesses a controlled substance while in a vehicle, he is guilty at least of possession of a controlled substance. If a vehicle contains a controlled substance but the defendant is not in the vehicle, he may be guilty of possession of a controlled substance by operation of the doctrine of constructive possession. State v. Mitchell, 336 N.C. 22, 442 S.E.2d 24 (1994).

Cited in State v. McEachern, 114 N.C. App. 218, 441 S.E.2d 574 (1994); State v. Hauser, 115 N.C. App. 431, 445 S.E.2d 73 (1994); Eury v. North Carolina Emp. Sec. Comm'n, 115 N.C. App. 590, 446 S.E.2d 383, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); State v. Hodge, 118 N.C. App. 655, 456 S.E.2d 855 (1995).

§ 90-109. Licensing required.

A facility for drug treatment as defined in G.S. 122C-3(14)b. shall obtain the license required by Article 2 of Chapter 122C of the General Statutes permitting operation. Subject to rules governing the operation and licensing of these facilities set by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, the Department of Human Resources shall be responsible for issuing licenses. These licensing rules shall be consistent with the licensing rules adopted under Article 2 of Chapter 122C of the General Statutes. (1971, c. 919, s. 1; 1973, c. 1361; 1977, c. 667, s. 3; 1981, c. 51, s. 9; 1983, c. 718, s. 2; 1985, c. 589, s. 32; 1995, c. 509, s. 39.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "Developmental Disabilities" for "Mental Retardation".

§ 90-112. Forfeitures.

CASE NOTES

Defendant's vehicle was subject to forfeiture, etc. —

Husband's testimony concerning his guilty pleas and his use of the defendant's vehicle while carrying a backpack containing proceeds from drug transactions were adequate to support a finding that the vehicle was used in the commission of a felony and that it was subject to forfeiture. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

Quoted in State v. Bonds, 120 N.C. App. 546, 463 S.E.2d 298 (1995).

OPINIONS OF ATTORNEY GENERAL

Money or personal property seized on the grounds it is subject to forfeiture, may not be released without a court order to the Department of Revenue for satisfication of controlled substance excise taxes owed by the property's owner. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

When a state or local law enforcement agency seizes money or personal property as evidence of a state controlled substances law violation or on the grounds the property is subject to forfeiture and subsequently releases it without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner, the court may not order the law enforcement agency which releases the property to pay into the court substitute funds of equal value. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

If a state or local law enforcement agency deposits funds with the court in substitution for money or personal property seized by the agency as evidence of a state controlled substances law violation or on the grounds it is subject to forfeiture but subsequently releases without a court order to the Department of Revenue for satisfaction of controlled substance excise taxes owed by the property's owner, the court may not order the substitute funds turned over to the owner of the original property or forfeit the substitute funds. See opinion of Attorney General to Secretary Janice H. Faulkner, — N.C.A.G. — (July 19, 1994).

§ 90-112.1. Remission or mitigation of forfeitures; possession pending trial.

CASE NOTES

No Right to Jury Trial. — An action under this section is in the nature of an action for replevin and is in essence a civil action; as such, the right to a jury trial, if any, is governed by N.C. Const., Art. I, § 25, and thus, defendant was not entitled to a trial by jury for her remission action. State v. Honaker, 111 N.C. App. 216, 431 S.E.2d 869 (1993).

ARTICLE 5A.

North Carolina Toxic Vapors Act.

§ 90-113.9. Definitions.

For purposes of this Article, unless the context requires otherwise,

(1) "Intoxication" means drunkenness, stupefaction, depression, giddiness, paralysis, irrational behavior, or other change, distortion, or disturbance of the auditory, visual, or mental processes.

(2) "Commission" means the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, established under Part 4 of Article 3 of Chapter 143B of the General Statutes. (1971, c. 1208, s. 1; 1979, c. 671, s. 1; 1981, c. 51, s. 10; 1995, c. 509, s. 40.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "Developmental Disabilities" for "Mental Retardation" in subdivision (2).

§ 90-113.13. Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 623, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5B.

Drug Paraphernalia.

§ 90-113.22. Possession of drug paraphernalia.

Editor's Note. — Session Laws 1993, c. 539, s. 624, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

CASE NOTES

Cited in State v. Sullivan, 110 N.C. App. 779, 431 S.E.2d 502 (1993); State v. Hauser, 115 N.C. App. 431, 445 S.E.2d 73 (1994).

§ 90-113.23. Manufacture or delivery of drug paraphernalia.

Editor's Note. — Session Laws 1993, c. 539, s. 625, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-113.24. Advertisement of drug paraphernalia.

Editor's Note. — Session Laws 1993, c. 539, s. 626, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 5C.

North Carolina Substance Abuse Professionals Certification Act.

§ 90-113.30. Declaration of purpose.

The North Carolina Substance Abuse Professionals Certification Board, established by G.S. 90-113.32, is recognized as the certifying authority for certified substance abuse counselors and certified substance abuse prevention consultants in order to safeguard the public health, safety, and welfare, to protect the public from being harmed by unqualified persons, to assure the highest degree of professional care and conduct on the part of certified substance abuse counselors and certified substance abuse prevention consultants, to provide for the establishment of standards for the education of substance abuse counselors and substance abuse prevention consultants, and to ensure the availability of substance abuse counseling services and substance abuse prevention services of high quality to persons in need of these services. It is the purpose of this Article to provide for the regulation of Board-certified persons offering substance abuse counseling services, substance abuse prevention services, or any other substance abuse services for which the Board may grant certification. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 685, s. 4, made this Article effective July 1, 1994, and applicable to requirements imposed on or after that date, and to causes of action, whether civil, criminal, or administrative, arising on or after that date.

§ 90-113.31. Definitions.

In this Article, unless the context clearly requires otherwise, the following definitions apply:

(1) "Board" means the North Carolina Substance Abuse Professionals Certification Board.

(2) "Certified substance abuse counselor" means any person certified to practice substance abuse counseling in accordance with the provisions of this Article.

(3) "Substance abuse counseling" means the assessment, evaluation, or provision of counseling to persons suffering from substance abuse or dependency, alcohol abuse or dependency, or drug abuse or dependency.

(4) "Certified substance abuse prevention consultant" means any person certified to practice substance abuse prevention in accordance with the provisions of this Article.

(5) "Prevention" means the reduction, delay, or avoidance of alcohol and of other drug use behavior. "Prevention" includes the promotion of positive environments and individual strengths that contribute to personal health and well-being over an entire life and the development of strategies that encourage individuals, families, and communities to take part in assessing and changing their lifestyle and environments. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.32. Board.

(a) The Board is created as the certifying authority for substance abuse counselors and substance abuse prevention consultants in North Carolina.

(b) Until the full Board is elected or appointed pursuant to subsection (c) of this section, the Board shall consist of 16 members with one member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121, and one member appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121. The remaining 14 shall be those members of the current North Carolina Substance Abuse Professionals Certification Board, Inc., who have terms that are unexpired as of the effective date of this Article. The initial Board shall appoint an initial Nominating and Elections Committee to fill immediate vacancies on the Board, using the process established in subsection (d) of this section. The election and appointment process of the initial Board shall result in a Board of 19 members by April 1, 1995. As these initial members' terms expire, their successors shall be appointed as described in subsection (c) of this section, until the permanent Board is established, as described in subsection (c) of this section. Time spent as an initial member counts in determining the limitation on consecutive terms prescribed in subsection (e) of this section.

(c) After the initial Board members' terms expire, the Board shall consist of 19 members, all of whom shall reside in North Carolina, appointed or elected as follows:

(1) Eleven professionals certified pursuant to this Article and

elected by the certified professionals, at least two of whom shall serve each of the four Division of Mental Health, Developmental Disabilities, and Substance Abuse Services regions of the State;

(2) Three members at large chosen from laypersons or other professional disciplines who have shown a special interest in the field of substance abuse, nominated by the Nominations and Elections Committee established by subsection (d) of this section and elected by the Board;

(3) Two members from the Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, Department of Human Resources, appointed by the Chief of Substance Abuse Services Section, Division of Mental Health, Developmental Disabilities, and Substance Abuse Services, Department of Human Resources, at least one of whom is from the Substance Abuse Services Section;

(4) One member of the public at large appointed by the Governor; and

(5) One member of the public at large appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives in accordance with G.S. 120-121 and one member of the public at large appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate in accordance with G.S. 120-121.

No members of the General Assembly shall serve on the Board.

(d) The Board shall appoint five professionals from the field of substance abuse counseling and substance abuse prevention consulting to serve on the Nominating and Elections Committee. Of these five, at least three shall not be members of the Board. The Board shall appoint a member of the Nominating and Elections Committee to serve as chair. The Committee's purpose is to accept nominations from professionals certified by the Board to fill vacancies on the Board in membership categories prescribed by subdivisions (1) and (2) of subsection (c) of this section and to conduct the election of Board members. The Committee shall solicit nominations from all professionals it has certified under this Article whenever such a vacancy occurs and when elected members' terms are due to expire. The certified professionals shall submit to the Committee all nominations within 90 days before the election of new Board members. The Committee shall furnish all certified professionals with a ballot containing all the nominees for each elected Board member vacancy. In soliciting and making nominations for this process, the Committee shall give consideration to factors that promote representation on the Board by professionals certified by the Board. The Committee shall serve for a two-year term, its successors to be appointed for the same term by the Board.

(e) Members of the Board shall serve for three-year terms. No Board member shall serve for more than two consecutive terms, but a person who has been a member for two consecutive terms may be reappointed after being off the Board for a period of at least one year. When a vacancy occurs in an unexpired term, the Board shall appoint temporary members to serve until the next membership election. Time spent as a temporary member does not count in determining the limitation on consecutive terms. (1993 (Reg. Sess., 1994), c. 685, s. 1; c. 773, ss. 15.2(a), 15.2(b).)

§ 90-113.33. Board; powers and duties.

The Board shall:

(1) Examine and determine the qualifications and fitness of applicants for certification to practice in this State as substance abuse counselors and as substance abuse prevention consultants;

(2) Issue, renew, deny, suspend, or revoke certification to practice in this State or reprimand or otherwise discipline substance abuse counselors and substance abuse prevention consultants in this State;

(3) Deal with issues concerning reciprocity;

(4) Conduct investigations for the purpose of determining whether violations of this Article or grounds for disciplining exist;

(5) Employ the professional and clerical personnel necessary to carry out the provisions of this Article. The Board may purchase or rent necessary office space, equipment, and supplies;

(6) Conduct administrative hearings in accordance with Chapter 150B of the General Statutes when a "contested case", as defined in Chapter 150B, arises;

(7) Appoint from its own membership one or more members to act as representatives of the Board at any meeting in which it considers this representation is desirable;

(8) Establish fees for applications for examination, certificates of certification and renewal, and other services provided by the Board; and

(9) Adopt any rules necessary to carry out the purpose of this Article and its duties and responsibilities pursuant to this Article.

The powers and duties enumerated in this section are granted for the purposes of enabling the Board to safeguard the public health, safety, and welfare against unqualified or incompetent practitioners and are to be liberally construed to accomplish this objective. When the Board exercises its authority under this Article to discipline a person, it may, as part of the decision imposing the discipline, charge the costs of investigations and the hearing to the person disciplined. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.34. Records to be kept; copies of records.

The Board shall obtain documentation of all proceedings under this Article and a record of all persons certified under it. The record shall show the name, last known place of business, last known place of residence, and date and number of the certificate of certification as a certified substance abuse counselor or certified substance abuse prevention consultant for every living certified person. Any interested person in the State is entitled to obtain a copy of that record on application to the Board and upon payment of a reasonable charge that is based on the costs involved in providing the copy. The Board shall keep a hard copy of all records. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.35. Disposition of funds.

All fees and other moneys collected and received by the Board shall be used to implement this Article. The financial records of the Board shall be subjected to an annual audit and paid for out of the funds of the Board. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.36. Certificates of certification.

(a) The Board shall furnish a certificate of certification to each applicant successfully completing the requirements for certification.

(b) The Board may furnish a certificate of certification to any person in another state or territory if the individual's qualifications were, at the date of registration or certification, substantially equal to the requirements under this Article. However, an out-of-state applicant shall first file application and pay any required fees. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.37. Renewal of certification; lapse; revival.

(a) Every person certified pursuant to this Article who desires to maintain certification status shall apply to the Board for a renewal of certification every other year and pay to the secretary-treasurer the prescribed fee. Renewal of certification is subject to completion of 60 hours of those continuing education requirements established by the Board. Certification that is not renewed automatically lapses, unless the Board provides for the late renewal of certification upon the payment of a late fee. No late renewal shall be granted more than five years after a certification expires. A suspended certification is subject to this section's renewal requirements and may be renewed as provided in this section. This renewal does not entitle the certified person to engage in the certified activity or in any other conduct or activity in violation of the order or judgment by which the certification was suspended, until the certification is reinstated. If a certification revoked on disciplinary grounds is reinstated and requires renewal, the certified person shall pay the renewal fee and any applicable late fee.

(b) The Board shall establish the manner in which lapsed certification may be revived or extended. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.38. Maximums for certain fees.

The combined fees to obtain a certificate of certification may not exceed three hundred dollars ($300.00). The fee to renew a certificate may not exceed one hundred dollars ($100.00). (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.39. Standards for certification.

The Board shall establish standards for certification of substance abuse professionals. The certification standards of the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse and of the National Association of Alcoholism and Drug Abuse Counselors may be used as guidelines for the Board's standards. The

Board shall publish these required standards separately from its rules so as to provide easy access to the standards. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.40. Requirements for certification.

The Board shall issue a certificate certifying an applicant as a "Certified Substance Abuse Counselor" or as a "Certified Substance Abuse Prevention Consultant" if:

(1) The applicant is of good moral character;

(2) The applicant is not and has not engaged in any practice or conduct that would be grounds for disciplinary action under G.S. 90-113.44;

(3) The applicant is qualified for certification pursuant to the requirements of this Article and any rules adopted pursuant to it;

(4) The applicant has, at a minimum, a high school diploma or a high school equivalency certificate;

(5) The applicant has signed a form attesting to the intention to adhere fully to the ethical standards adopted by the Board;

(6) The applicant has completed 270 hours of Board-approved education;

(7) The applicant has documented completion of a minimum of 300 hours of Supervised Practical Training and has provided a Board-approved supervision contract between the applicant and an approved supervisor;

(8) The applicant has completed either a total of three years of supervised experience in the field, whether paid or volunteer, or, if a graduate of a Board-approved masters degree program, a total of 18 months of supervised experience in the field, whether paid or volunteer; and

(9) The applicant has successfully completed a written examination and an oral examination promulgated and administered by the Board.

The Board shall publish from time to time information in order to provide specifics for potential applicants of an acceptable educational curriculum and the terms of acceptable supervised fieldwork experience. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.41. Examination.

(a) Applicants for certification under this Article shall file an application at least 60 days prior to the date of examination and upon the forms and in the manner prescribed by the Board. The application shall be accompanied by the appropriate fee. No portion of this fee is refundable. Applicants who fail an examination may apply for reexamination upon the payment of another examination fee.

(b) Each applicant for certification under this Article shall be examined in an examination that is consistent with the examination requirements of the International Certification Reciprocity Consortium/Alcohol and Other Drug Abuse.

(c) Applicants for certification shall be examined at a time and place and under the supervision that the Board determines. Examinations shall be given in this State at least twice each year.

(d) Applicants may obtain their examination scores and may review their examination papers in accordance with rules the Board adopts. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.42. Exemptions.

It is not the intent of this Article to regulate members of other regulated professions who provide substance abuse services or consultation in the normal course of the practice of their profession. Accordingly, this Article does not apply to any person registered, certified, or licensed by the State to practice any other occupation or profession while rendering substance abuse services or consultation in the performance of the occupation or profession for which he is registered, certified, or licensed. Only individuals certified under this Article may use the title "certified substance abuse counselor" or "certified substance abuse prevention consultant". (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.43. Illegal practice; misdemeanor penalty.

Except as otherwise authorized in this Article, no person shall:

(1) Practice, attempt to practice, or supervise while holding out to be a certified substance abuse counselor or a certified substance abuse prevention consultant without first having obtained a certificate of certification from the Board;

(2) Use in connection with any name any letters, words, numerical codes, or insignia indicating or implying that this person is a certified substance abuse counselor or a certified substance abuse prevention consultant unless this person is certified pursuant to this Article;

(3) Practice or attempt to practice as a certified substance abuse counselor or certified substance abuse prevention consultant with a revoked, lapsed, or suspended certification;

(4) Aid, abet, or assist any uncertified person to practice as a certified substance abuse counselor or certified substance abuse prevention consultant in violation of this Article;

(5) Knowingly serve in a position required by State law or rule or federal law or regulation to be filled by a certified substance abuse counselor or a certified substance abuse prevention consultant unless that person is so certified under this Article; or

(6) Otherwise violate any of the provisions of this Article or any of the rules adopted pursuant to it.

A person who engages in any of the illegal practices enumerated by this section is guilty of a Class 1 misdemeanor. Each act of unlawful practice constitutes a distinct and separate offense. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.44. Grounds for disciplinary action.

Grounds for disciplinary action include:

(1) The employment of fraud, deceit, or misrepresentation in obtaining or attempting to obtain certification or renewal of certification;

(2) The use of drugs or alcoholic beverages to the extent that professional competency is affected, until proof of rehabilitation can be established;

(3) Conviction of an offense under any municipal, State, or federal narcotic or controlled substance law, until proof of rehabilitation can be established;

(4) Conviction of a felony or other public offense involving moral turpitude, until proof of rehabilitation can be established;

(5) An adjudication of insanity or incompetency, until proof of recovery from this condition can be established;

(6) Engaging in any act or practice violative of any of the provisions of this Article or any of the rules adopted pursuant to it, or aiding, abetting, or assisting any other person in such a violation;

(7) The commission of an act of malpractice, gross negligence, or incompetence in the practice of substance abuse counseling or in substance abuse prevention consulting;

(8) Practicing as a certified substance abuse counselor or as a certified substance abuse prevention consultant without a valid certificate; and

(9) Engaging in conduct that could result in harm or injury to the public. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.45. Enjoining illegal practices.

(a) The Board may, if it finds that any person is violating any of the provisions of this Article or of the rules adopted pursuant to it, apply in its own name to the superior court for a temporary or permanent restraining order or injunction to restrain that person from continuing these illegal practices. The court may grant injunctive relief regardless of whether criminal prosecution or other action has been or may be instituted as a result of the violation. In the court's consideration of the issue of whether to grant or continue an injunction sought by the Board, a showing of conduct in violation of the terms of this Article shall be sufficient to meet any requirement of general North Carolina injunction law for irreparable damage.

(b) The venue for actions brought under this section is the superior court of any county in which the illegal acts are alleged to have been committed or in the county where the defendant resides. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

§ 90-113.46. Application of requirements of Article.

All persons certified by the North Carolina Substance Abuse Professionals Certification Board, Inc., as of the effective date of this Article shall be certified by the Board pursuant to this Article. All these persons are subject to all the other requirements of this Article and of the rules adopted pursuant to it. (1993 (Reg. Sess., 1994), c. 685, s. 1.)

ARTICLE 6.

Optometry.

§ 90-117.4. Judicial powers; additional data for records.

Editor's Note. — Session Laws 1993, c. 539, s. 627, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-118.11. Unauthorized practice; penalty for violation of Article.

Editor's Note. — Session Laws 1993, c. 539, s. 628, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-124. Rules and regulations of Board; violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 629, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 7.

Osteopathy.

§ 90-136. Refusal, revocation or suspension of license; misdemeanors.

Editor's Note. — Session Laws 1993, c. 539, s. 630, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Article 8.

Chiropractic.

§ 90-139. Creation and membership of Board of Examiners.

(a) The State Board of Chiropractic Examiners is created to consist of seven members appointed by the Governor, and General Assembly. Six of the members shall be practicing doctors of chiropractic, who are residents of this State and who have actively practiced chiropractic in the State for at least eight consecutive years immediately preceding their appointments; four of these six members shall be appointed by the Governor, and two by the General Assembly in accordance with G.S. 120-121, one each upon the recommendation of the President Pro Tempore of the Senate and the Speaker of the House of Representatives. No more than three members of the Board may be graduates of the same college or school of chiropractic. The other member shall be a person chosen by the Governor to represent the public at large. The public member shall not be a health care provider nor the spouse of a health care provider. For purposes of Board membership, "health care provider" means any licensed health care professional and any agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this section, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall be deemed a health care provider. For purposes of this section, any person with significant financial interest in a health service or profession is not a public member.

(b) All Board members serving on June 30, 1981, shall be eligible to complete their respective terms. No member appointed to the Board on or after July 1, 1981, shall serve more than two complete consecutive terms, except that each member shall serve until his successor is chosen and qualifies. The initial appointment of the General Assembly upon the recommendation of the President of the Senate shall be for a term to expire June 30, 1986, and the initial appointment of the General Assembly upon the recommendation of the Speaker of the House of Representatives shall be for a term to expire June 30, 1985, subsequent appointments upon the recommendation of the President of the Senate shall be for terms of three years, subsequent appointments upon the recommendation of the Speaker of the House of Representatives shall be for terms of two years.

(c) The Governor and General Assembly, respectively, may remove any member appointed by them for good cause shown. In addition, upon the request of the Speaker of the House of Representatives or the President Pro Tempore of the Senate concerning a person appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives or the President Pro Tempore of the Senate, respectively, the Governor may remove such appointee for good cause shown, if the request is made and removal occurs either (i) when the General Assembly has adjourned to a date certain, which date is more than 10 days after the date of adjournment, or (ii) after sine die adjournment of the regular session. The Governor may appoint persons to fill vacancies of persons appointed by him to fill unexpired terms. Vacancies in appointments made by the General Assembly shall be in accordance with G.S. 120-122. (1917, c. 73, s. 1; C.S., s. 6710; 1979, c. 108, s. 1; 1981, c. 766, s. 1; 1983, c. 717, ss. 100-104; 1995, c. 490, s. 11.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment added "Pro Tempore" in the second sentence of subsection (a) and twice in the second sentence of subsection (c). For the applicability of this amendment, see editor's note.

§ 90-140. Selection of chiropractic members of Board.

The Governor and the General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint chiropractic members of the Board for terms of three years from a list provided by the Board, and the General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint a chiropractic member of the Board for a term of two years from a list provided by the Board. For each vacancy, the Board must submit at least three names to the Governor, President Pro Tempore of the Senate and Speaker of the House.

The Board shall establish procedures for the nomination and election of chiropractic members. These procedures shall be adopted under Article 2 of Chapter 150B of the General Statutes, and notice of the proposed procedures shall be given to all licensed chiropractors residing in North Carolina. These procedures shall not conflict with the provisions of this section. Every chiropractor with a current North Carolina license residing in this State shall be eligible to vote in all such elections, and the list of licensed chiropractors shall constitute the registration list for elections. Any decision of the Board relative to the conduct of such elections may be challenged by civil action in the Wake County Superior Court. A challenge must be filed not later than 30 days after the Board has rendered the decision in controversy, and all such cases shall be heard de novo. (1917, c. 73, s. 2; C.S., s. 6711; 1933, c. 442, s. 1; 1963, c. 646, s. 1; 1979, c. 108, s. 2; 1981, c. 766, s. 2; 1983, c. 717, s. 106; 1987, c. 827, s. 1; 1995, c. 490, s. 11.1.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment in the first paragraph added "Pro Tempore" in the first sentence, and substituted "President Pro Tempore of the Senate" for "Lieutenant Governor" in the last sentence. For the applicability of this amendment, see editor's note.

§ 90-143. Definitions of chiropractic; examinations; educational requirements.

CASE NOTES

Cited in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

§ 90-147. Practice without license a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 631, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-153. Licensed chiropractors may practice in public hospitals.

CASE NOTES

Hospital Not Required to Give Access. — Legislature's use of the word "may" indicates it is not a requirement that a licensed chiropractor have access to and practice chiropractic in any hospital. Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

§ 90-154. Grounds for professional discipline.

(a) The Board of Chiropractic Examiners may impose any of the following sanctions, singly or in combination, when it finds that a practitioner or applicant is guilty of any offense described in subsection (b):

(1) Permanently revoke a license to practice chiropractic;
(2) Suspend a license to practice chiropractic;
(3) Refuse to grant a license;
(4) Censure a practitioner;
(5) Issue a letter of reprimand;
(6) Place a practitioner on probationary status and require him to report regularly to the Board upon the matters which are the basis of probation.

(b) Any one of the following is grounds for disciplinary action by the Board under subsection (a):

(1) Advertising services in a false or misleading manner.
(2) Conviction of a felony or of a crime involving moral turpitude.
(3) Addiction to or severe dependency upon alcohol or any other drug that impairs the ability to practice safely.
(4) Unethical conduct as defined in G.S. 90-154.2.
(5) Negligence, incompetence, or malpractice in the practice of chiropractic.
(6) Repealed by Session Laws 1995, c. 188, s. 1, effective October 1, 1995.
(7) Not rendering acceptable care in the practice of the profession as defined in G.S. 90-154.3.
(8) Lewd or immoral conduct toward a patient.
(9) Committing or attempting to commit fraud, deception, or misrepresentation.
(10) Offering to waive a patient's obligation to pay any deductible or copayment required by the patient's insurer.
(11) Failing to honor promptly a patient's request for a copy of any claim form submitted to the patient's insurer.
(12) Rebating or offering to rebate to a patient any portion of the funds received from the patient's insurer, unless the sum rebated constitutes the refund of an overpayment to which the patient is lawfully entitled.
(13) Advertising any free or reduced rate service without prominently stating in the advertisement the usual fee for that service.
(14) Charging an insurer or other third-party payor a fee greater than a patient would be charged for the same service if the patient were paying directly.

(15) Charging an insurer or other third-party payor a fee greater than the advertised fee for the same service.

(16) Violating the provisions of G.S. 90-154.1.

(17) Physical, mental, or emotional infirmity of such severity as to impair the ability to practice safely.

(18) Violating the provisions of G.S. 90-151 regarding the extent and limitation of license.

(19) Concealing information from the Board or failing to respond truthfully and completely to an inquiry from the Board concerning any matter affecting licensure.

(20) Failing to comply with a decision of the Board that is final. (1917, c. 73, s. 14; C.S., s. 6725; 1949, c. 785, s. 3; 1963, c. 646, s. 3; 1981, c. 766, s. 7; 1983 (Reg. Sess., 1984), c. 1067, s. 1; 1985, c. 367, ss. 1, 2; c. 760, ss. 2, 3; 1995, c. 188, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (b), substituted "Any one of the following is" for "The following are" in the introductory language; rewrote subdivisions (b)(3), (b)(5), and (b)(8) through (b)(15); deleted subdivision (b)(6) regarding acts constituting malpractice; added subdivisions (b)(17) through (b)(20); and made other stylistic changes throughout the subsection.

§ 90-154.1. Collection of certain fees prohibited.

(a) Any patient or any other person responsible for payment has the right to refuse to pay, cancel payment, or be reimbursed for payment for any service, examination, or treatment other than the advertised reduced rate service, examination or treatment which is performed as a result of and within 72 hours of responding to any advertisement for a free or reduced rate service, free or reduced rate examination, or free or reduced rate treatment. Any further treatment shall be agreed upon in writing and signed by both parties.

(b) Any chiropractic advertisement that offers a free or reduced rate service, examination or treatment shall contain the following notice to prospective patients: "If you decide to purchase additional treatment, you have the legal right to change your mind within three days and receive a refund." If the advertisement is published in print, the foregoing notice shall appear in capital letters clearly distinguishable from the rest of the text. If the advertisement is broadcast on radio or television, the foregoing notice shall be recited at the end of the advertisement.

(c) Repealed by Session Laws 1995, c. 188, s. 2, effective October 1, 1995.

(d) Any bill sent to a patient or any other person responsible for payment as a result of the patient responding to a chiropractic advertisement shall clearly contain the language of the first sentence of subsection (a) and have distinguished on its face the charge for the reduced rate services, including an itemization of free services, and the separate charge for any services, examinations or treatments other than the advertised free or reduced rate services, examinations, or treatments. The reduced rate charges shall be labeled "Free or Reduced Rate Charges" and any other charges shall be labeled "Non-advertised Services, Examinations, or Treatments". (1985, c. 367, s. 3; 1987, c. 733; 1995, c. 188, s. 2.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, added the last sentence in subsection (a); rewrote subsection (b); deleted subsection (c) regarding broadcast advertisements for free or reduced rates by a chiropractor; and in subsection (d), in the first sentence inserted "the first sentence of" preceding "subsection (a)" and deleted "such" following "distinguished".

§ 90-154.3. Acceptable care in the practice of chiropractic.

(a) It shall be unlawful for a doctor of chiropractic to examine, treat, or render any professional service to a patient that does not conform to the standards of acceptable care.

(b) For purposes of disciplinary action, the Board of Chiropractic Examiners may adopt rules that establish and define standards of acceptable care with respect to:

(1) Examination and diagnosis;
(2) The use of chiropractic adjustive procedures;
(3) Physiological therapeutic agents;
(4) Diagnostic radiology;
(5) The maintenance of patient records; and
(6) Sanitation, safety, and the adequacy of clinical equipment.

(c) If the Board has not defined a standard of acceptable care by rule, then the standard of acceptable care shall be the usual and customary method as taught in the majority of recognized chiropractic colleges.

(d) Nothing in this section shall alter the lawful scope of practice of chiropractic as defined in G.S. 90-143 or the limitation of license as defined in G.S. 90-151. (1985, c. 760, s. 5; 1995, c. 188, s. 3.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, rewrote this section.

§ 90-157.1. Free choice by patient guaranteed.

CASE NOTES

Quoted in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

§ 90-157.2. Chiropractor as expert witness.

CASE NOTES

Expert's testimony was within the expertise of a chiropractor as authorized by this section. Wooten v. Warren ex rel. Gilmer, 117 N.C. App. 350, 451 S.E.2d 342 (1994).

ARTICLE 9A.

Nursing Practice Act.

§ 90-171.23. Duties, powers, and meetings.

(a) Meetings. The Board shall hold at least two meetings each year to transact its business. The Board shall adopt rules with respect to calling, holding, and conducting regular and special meetings and attendance at meetings. The majority of the Board members constitutes a quorum.

(b) Duties, powers. The Board is empowered to:

(1) Administer this Article;

(2) Issue its interpretations of this Article;

(3) Adopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of this Article;

(4) Establish qualifications of, employ, and set the compensation of an executive officer who shall be a registered nurse and who shall not be a member of the Board;

(5) Employ and fix the compensation of other personnel that the Board determines are necessary to carry into effect this Article and incur other expenses necessary to effectuate this Article;

(6) Examine, license, and renew the licenses of duly qualified applicants for licensure;

(7) Cause the prosecution of all persons violating this Article;

(8) Prescribe standards to be met by the students, and to pertain to faculty, curricula, facilities, resources, and administration for any nursing program as provided in G.S. 90-171.38;

(9) Survey all nursing programs at least every five years or more often as deemed necessary by the Board or program director;

(10) Grant or deny approval for nursing programs as provided in G.S. 90-171.39;

(11) Upon request, grant or deny approval of continuing education programs for nurses as provided in G.S. 90-171.42;

(12) Keep a record of all proceedings and make available to the Governor and licensees an annual summary of all actions taken;

(13) Appoint, as necessary, advisory committees which may include persons other than Board members to deal with any issue under study;

(14) Appoint and maintain a subcommittee of the Board to work jointly with the subcommittee of the North Carolina Medical Board to develop rules and regulations to govern the performance of medical acts by registered nurses and to determine reasonable fees to accompany an application for approval or renewal of such approval as provided in G.S. 90-6. The fees and rules developed by this subcommittee shall govern the performance of medical acts by registered nurses and shall become effective when they have been adopted by both Boards;

(15) Recommend and collect such fees for licensure, license renewal, examinations and reexaminations as it deems necessary for fulfilling the purposes of this Article; and

(16) Adopt a seal containing the name of the Board for use on all certificates, licenses, and official reports issued by it. (1981, c. 360, s. 1; c. 665, s. 2; c. 852, s. 4; 1995, c. 94, s. 28.)

Editor's Note. — Session Laws 1995, c. 94, s. 28, states in the introductory language that "G.S. 90-171.23(14) reads as rewritten." The amendment has been set out in subsection (b)(14) above at the direction of the Revisor of Statutes.

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in subsection (b)(14).

§ 90-171.25. Custody and use of funds.

The executive director shall deposit in financial institutions designated by the Board as official depositories all fees payable to the Board. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Article. (1981, c. 360, s. 1; 1993, c. 198, s. 2; c. 257, s. 4; 1995, c. 509, s. 41.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "in accordance with State law" at the end of this section.

§ 90-171.37. Revocation, suspension, or denial of licensure.

The Board shall initiate an investigation upon receipt of information about any practice that might violate any provision of this Article or any rule or regulation promulgated by the Board. In accordance with the provisions of Chapter 150B of the General Statutes, the Board may require remedial education, issue a letter of reprimand, restrict, revoke, or suspend any license to practice nursing in North Carolina or deny any application for licensure if the Board determines that the nurse or applicant:

(1) Has given false information or has withheld material information from the Board in procuring or attempting to procure a license to practice nursing;
(2) Has been convicted of or pleaded guilty or nolo contendere to any crime which indicates that the nurse is unfit or incompetent to practice nursing or that the nurse has deceived or defrauded the public;
(3) Has a mental or physical disability or uses any drug to a degree that interferes with his or her fitness to practice nursing;
(4) Engages in conduct that endangers the public health;
(5) Is unfit or incompetent to practice nursing by reason of deliberate or negligent acts or omissions regardless of whether actual injury to the patient is established;
(6) Engages in conduct that deceives, defrauds, or harms the public in the course of professional activities or services;
(7) Has violated any provision of this Article; or
(8) Has willfully violated any rules enacted by the Board.

The Board may take any of the actions specified above in this section when a registered nurse approved to perform medical acts has violated rules governing the performance of medical acts by a registered nurse; provided this shall not interfere with the authority of the North Carolina Medical Board to enforce rules and regulations governing the performance of medical acts by a registered nurse.

The Board may reinstate a revoked license or remove licensure restrictions when it finds that the reasons for revocation or restriction no longer exist and that the nurse or applicant can reasonably be expected to safely and properly practice nursing. (1981, c. 360, s. 1; c. 852, s. 3; 1987, c. 827, s. 1; 1991, c. 643, s. 4; 1991 (Reg. Sess., 1992), c. 1030, s. 22; 1995, c. 94, s. 29.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in the second paragraph.

§ 90-171.43. License required.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-171.45. Violation of Article.

Editor's Note. — Session Laws 1993, c. 539, s. 632, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 9D.

Nursing Scholars Program.

§ 90-171.61. Nursing Scholars Program established; administration.

(a) There is established the Nursing Scholars Program. The North Carolina Nursing Scholars Commission shall determine selection criteria, methods of selection, and shall select recipients of scholarship loans made under the Nursing Scholars Program.

(b) The Nursing Scholars Program shall be used to provide the following:

(1) A four-year scholarship loan in the amount of five thousand dollars ($5,000) per year, per recipient, to North Carolina high school seniors or other persons interested in preparing to become a registered nurse through a baccalaureate degree program.

(2) A two-year scholarship loan in the amount of three thousand dollars ($3,000) per year, per recipient, to persons interested in preparing to be a registered nurse through an associate degree nursing program or a diploma nursing program.

(3) A two-year scholarship loan in the amount of three thousand dollars ($3,000) per year, per recipient, for two years of baccalaureate nursing study for college juniors or community college graduates interested in preparing to be a registered nurse.

(4) A two-year scholarship loan of three thousand dollars ($3,000) per year, per recipient, for two years of baccalaureate study in nursing for registered nurses who do not hold a baccalaureate degree in nursing.

(5) A two-year scholarship loan of six thousand dollars ($6,000) per year, per recipient, for two years of study leading to a master of science in nursing degree for people already holding a baccalaureate degree in nursing.

In addition to the scholarship loans awarded pursuant to subdivisions (1) through (5) of this subsection, the Commission may award pro rata scholarship loans to recipients enrolled at least half-time in study leading to a master of science in nursing degree who already hold a baccalaureate degree in nursing. In awarding all scholarship loans, the Commission shall give priority to full-time students over part-time students. The State Education Assistance Authority shall adopt specific rules to regulate scholarship loans to part-time master of science in nursing students.

Within current funds available or with any additional funds provided by the General Assembly for this purpose, the Commission may set aside slots for scholarship loans prescribed by subdivisions (1) and (2) of this subsection to enable licensed practical nurses to become registered nurses. The State Education Assistance Authority shall adopt specific rules to regulate these scholarship loans.

(c) The Commission shall adopt stringent standards, which may include minimum grade point average, scholastic aptitude test scores, and other standards deemed appropriate by the Commission, to ensure that only the best potential students receive loans under the Nursing Scholars Program. Standards adopted by the Commission shall include provisions for ensuring that the qualifications of applicants who are or would be nontraditional students are considered fairly in providing them with opportunities to compete for the loans. Loans under the Nursing Scholars Program shall be awarded only to applicants who meet the standards set by the Commission and who agree to practice nursing in North Carolina upon completion of the nursing education program supported by the loan.

(d) The Commission shall develop and administer the Nursing Scholars Program in cooperation with nursing schools at institutions approved by the Commission and the North Carolina Board of Nursing. The Nursing Scholars Program shall provide for participants to be exposed to a range of extracurricular activities while in school, which activities shall be aimed at instilling in students a strong motivation to remain in the practice of nursing and to provide leadership for the nursing profession.

(e) The Commission may form regional review committees to assist it in identifying the best high school seniors and other applicants for the program. The Commission and the review committees shall make an effort to identify and encourage minority students and students who may not otherwise consider a career in nursing to apply for the Nursing Scholars Program.

(f) Upon the naming of recipients of loans from the Nursing Scholars Program, the Commission shall inform the State Education Assistance Authority (SEAA) of its decisions. The SEAA shall perform all of the administrative functions necessary to implement this Article, which functions shall include: rule-making, dissemination of information to the public, distribution and receipt of applications for scholarship loans, and the functions necessary for the execution, payment, and enforcement of promissory notes required under this Article. (1989, c. 594, s. 1; 1991, c. 550, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

§ 90-171.62. Terms of loans; receipt and disbursement of funds.

(a) All scholarship loans shall be evidenced by notes made payable to the State Education Assistance Authority that bear interest at the rate of ten percent (10%) per year beginning 90 days after completion of the nursing education program, or 90 days after termination of the scholarship loan, whichever is earlier. The scholarship loan may be terminated upon the recipient's withdrawal from school or by the recipient's failure to meet the standards set by the Commission.

(b) The State Education Assistance Authority shall forgive the loan if, within seven years after graduation from a nursing education program, the recipient practices nursing in North Carolina for one year for every year a scholarship loan was provided. If the recipient repays the scholarship loan by cash payments, all indebtedness shall be repaid within ten years. The Authority may provide for accelerated repayment and for less than full-time employment options to encourage the practice of nursing in either geographic or nursing specialty shortage areas. The Authority shall adopt specific rules to designate these geographic areas and these nursing specialty shortage areas, upon recommendations of the North Carolina Center for Nursing. The North Carolina Center for Nursing shall base its recommendations on objective information provided by interested groups or agencies and upon objective information collected by the Center. The Authority may forgive the scholarship loan if it determines that it is impossible for the recipient to practice nursing in North Carolina for a sufficient time to repay the loan because of the death or permanent disability of the recipient within ten years following graduation or termination of enrollment in a nursing education program.

(c) All funds appropriated to or otherwise received by the Nursing Scholars Program for scholarships, all funds received as repayment of scholarship loans, and all interest earned on these funds, shall be placed in a revolving fund. This revolving fund may be used only for scholarship loans granted under the Nursing Scholars Program. (1989, c. 594, s. 1; 1991, c. 550, s. 1.1; 1993 (Reg. Sess., 1994), c. 769, s. 17.11(b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

ARTICLE 10A.

Practice of Midwifery.

§ 90-178.2. Definitions.

As used in this Article:

(1) "Interconceptional care" includes but is not limited to:
  a. Family planning;
  b. Screening for cancer of the breast and reproductive tract; and

   c. Screening for and management of minor infections of the reproductive organs;

(2) "Intrapartum care" includes but is not limited to:
   a. Attending women in uncomplicated labor;
   b. Assisting with spontaneous delivery of infants in vertex presentation from 37 to 42 weeks gestation;
   c. Performing amniotomy;
   d. Administering local anesthesia;
   e. Performing episiotomy and repair; and
   f. Repairing lacerations associated with childbirth.

(3) "Midwifery" means the act of providing prenatal, intrapartum, postpartum, newborn and interconceptional care. The term does not include the practice of medicine by a physician licensed to practice medicine when engaged in the practice of medicine as defined by law, the performance of medical acts by a physician assistant or nurse practitioner when performed in accordance with the rules of the North Carolina Medical Board, the practice of nursing by a registered nurse engaged in the practice of nursing as defined by law, or the rendering of childbirth assistance in an emergency situation.

(4) "Newborn care" includes but is not limited to:
   a. Routine assistance to the newborn to establish respiration and maintain thermal stability;
   b. Routine physical assessment including APGAR scoring;
   c. Vitamin K administration; and
   d. Eye prophylaxis for opthalmia neonatorum.

(5) "Postpartum care" includes but is not limited to:
   a. Management of the normal third stage of labor;
   b. Administration of pitocin and methergine after delivery of the infant when indicated; and
   c. Six weeks postpartum evaluation exam and initiation of family planning.

(6) "Prenatal care" includes but is not limited to:
   a. Historical and physical assessment;
   b. Obtaining and assessing the results of routine laboratory tests; and
   c. Supervising the use of prenatal vitamins, folic acid, iron, and nonprescription medicines. (1983, c. 897, s. 1; 1995, c. 94, s. 30.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, substituted "North Carolina Medical Board" for "Board of Medical Examiners" in subdivision (3).

§ 90-178.4. Administration.

(a) The joint subcommittee of the North Carolina Medical Board and the Board of Nursing created pursuant to G.S. 90-18.2 shall administer the provisions of this Article and the rules adopted pursuant to this Article; Provided, however, that actions of the joint subcommittee pursuant to this Article shall not require approval by the North Carolina Medical Board and the Board of Nursing. For purposes of this Article, the joint subcommittee shall be enlarged by four additional members, including two certified midwives and two obstetricians who have had working experience with midwives.

(b) The joint subcommittee shall adopt rules pursuant to this Article to establish:

(1) A fee which shall cover application and initial approval up to a maximum of one hundred dollars ($100.00);

(2) An annual renewal fee to be paid by January 1 of each year by persons approved pursuant to this Article up to a maximum of fifty dollars ($50.00);

(3) A reinstatement fee for a lapsed approval up to a maximum of five dollars ($5.00);

(4) The form and contents of the applications which shall include information related to the applicant's education and certification by the American College of Nurse-Midwives; and

(5) The procedure for establishing physician supervision as required by this Article.

(c) The joint subcommittee may solicit, employ, or contract for technical assistance and clerical assistance and may purchase or contract for the materials and services it needs.

(d) All fees collected on behalf of the joint subcommittee and all receipts of every kind and nature, as well as the compensation paid the members of the joint subcommittee and the necessary expenses incurred by them in the performance of the duties imposed upon them, shall be reported annually to the State Treasurer. All fees and other moneys received by the joint subcommittee pursuant to the provisions of the General Statutes shall be kept in a separate fund by the joint subcommittee, to be held and expended only for such purposes as are proper and necessary to the discharge of the duties of the joint subcommittee and to enforce the provisions of this Article. No expense incurred by the joint subcommittee shall be charged against the State.

(e) Members of the joint subcommittee who are not officers or employees of the State shall receive compensation and reimbursement for travel and subsistence expenses at the rates specified in G.S. 138-5. Members of the joint subcommittee who are officers or employees of the State shall receive reimbursement for travel and subsistence expenses at the rate set out in G.S. 138-6. (1983, c. 897, s. 1; 1995, c. 94, s. 31.)

Effect of Amendments. — The 1995 amendment, effective May 22, 1995, in subsection (a) substituted "North Carolina Medical Board" for "Board of Medical Examiners", and substituted "North Carolina Medical Board and the Board of Nursing" for "Board of Medical Examiners and of Nursing".

§ 90-178.7. Enforcement.

Editor's Note. — Session Laws 1993, c. 539, s. 633, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 11.

Veterinarians.

§ 90-182. North Carolina Veterinary Medical Board; appointment, membership, organization.

Editor's Note. — Session Laws 1993, c. 500, s. 19, as amended by 1993 (Reg. Sess., 1994) c. 774, s. 19, provides that Section 3 of Session Laws 1993, c. 500, which amended subsection (a) of this section, does not affect the term of office of any member serving on the date the act becomes effective, October 1, 1993, and that the total membership on the North Carolina Veterinary Medical Board, as set forth in Section 3, is temporarily increased to eight during the remainder of the term of office of the member appointed by the House of Representatives.

§ 90-187.6. Veterinary technicians and veterinary employees.

(a) "Veterinary technicians," "veterinary student interns," and "veterinary student preceptees," before performing any services otherwise prohibited to persons not licensed or registered under this Article, shall be approved by and registered with the Board. The Board shall be responsible for all matters pertaining to the qualifications, registration, discipline, and revocation of registration of these persons, under this Article and rules issued by the Board.

(b) The services of a technician, intern, preceptee, or other veterinary employee shall be limited to services under the direction and supervision of a veterinarian. This employee shall receive no fee or compensation of any kind for services other than any salary or compensation paid to the employee by the veterinarian or veterinary facility by which the employee is employed. The employee may participate in the operation of a branch office, clinic, or allied establishment only to the extent allowable under and as defined by this Article or by rules issued by the Board.

(c) An employee under the supervision of a veterinarian may perform such duties as are required in the physical care of animals and in carrying out medical orders as prescribed by the veterinarian, requiring an understanding of animal science but not requiring the professional services as set forth in G.S. 90-181(6)a. In addition, a veterinary technician may assist veterinarians in diagnosis, laboratory analysis, anesthesia, and surgical procedures. Neither the employee nor the veterinary technician may perform any act producing an irreversible change in the animal. An employee, other than a veterinary technician, intern, or preceptee, may, under the direct supervision of a veterinarian, perform duties including collection of specimen; testing for intestinal parasites; collecting blood; testing for heartworms and conducting other laboratory tests; taking radiographs; and cleaning and polishing teeth, provided that the employee has had sufficient on-the-job training by a veterinarian to perform these specified duties in a competent manner. It shall be the responsibility of the veterinarian supervising the employee to ascertain that the employee performs these specified duties assigned to the employee in a competent manner. These specified duties shall be performed under the direct supervision of the veterinarian in charge of administering care to the patient.

(d) Veterinary student interns, in addition to all of the services permitted to veterinary technicians, may, under the direct personal supervision of a veterinarian, perform surgery and administer therapeutic or prophylactic drugs.

(e) Veterinary student preceptees, in addition to all of the services permitted to veterinary technicians and veterinary student interns, may, upon the direction of the employing veterinarian, make ambulatory calls and hospital and clinic diagnoses, prescriptions and treatments.

(f) Any person registered as a veterinary technician, veterinary student intern, or veterinary student preceptee, who shall practice veterinary medicine except as provided herein, shall be guilty of a Class 1 misdemeanor, and shall also be subject to revocation of registration. Any nonregistered veterinary employee employed under subsection (c) who practices veterinary medicine except as provided under that subsection shall be guilty of a Class 1 misdemeanor.

(g) Any veterinarian directing or permitting a veterinary technician, intern, preceptee or other employee to perform a task or procedure not specifically allowed under this Article and the rules of the Board shall be guilty of a Class 1 misdemeanor. (1973, c. 1106, s. 1; 1981, c. 767, ss. 8-11; 1993, c. 500, s. 14; c. 539, ss. 634, 635; 1995, c. 509, s. 42.)

Editor's Note. —
Session Laws 1993, c. 539, ss. 634, 635, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "under" preceding "under this Article" in the second sentence of subsection (a).

§ 90-187.10. Necessity for license; certain practices exempted.

No person shall engage in the practice of veterinary medicine or own all or part interest in a veterinary medical practice in this State or attempt to do so without having first applied for and obtained a license for such purpose from the North Carolina Veterinary Medical Board, or without having first obtained from said Board a certificate of renewal of license for the calendar year in which such person proposes to practice and until he shall have been first licensed and registered for such practice in the manner provided in this Article and the rules and regulations of the said Board.

Nothing in this Article shall be construed to prohibit:

(1) Any person or his employee from administering to animals, the title to which is vested in himself, except when said title is so vested for the purpose of circumventing the provisions of this Article;

(2) Any person who is a regular student or instructor in a legally chartered college from the performance of those duties and actions assigned as his responsibility in teaching or research;

(3) Any veterinarian not licensed by the Board who is a member of the armed forces of the United States or who is an employee of the United States Department of Agriculture, the United States Public Health Service or other federal agency, or the State of North Carolina, or political subdivision thereof, from performing official duties while so commissioned or employed;

(4) Any person from such practices as permitted under the provisions of G.S. 90-185, House Bill 659, Chapter 17, Public Laws 1937, or House Bill 358, Chapter 5, Private Laws 1941;

(5) Any person from dehorning or castrating male food animals;

(6) Any person from providing for or assisting in the practice of artificial insemination;

(7) Any physician licensed to practice medicine in this State, or his assistant, while engaged in medical research;

(8) Any certified rabies vaccinator appointed, certified and acting within the provisions of G.S. 130A-186;

(9) Any veterinarian licensed to practice in another state from examining livestock or acting as a consultant in North Carolina, provided he is directly supervised by a veterinarian licensed by the Board who must, at or prior to the first instance of consulting, notify the Board, in writing, that he is supervising the consulting veterinarian, give the Board the name, address, and licensure status of the consulting veterinarian, and also verify to the Board that the supervising veterinarian assumes responsibility for the professional acts of the consulting veterinarian; and provided further, that the consultation by the veterinarian in North Carolina does not exceed 10 days or parts thereof per year, and further that all infectious or contagious diseases diagnosed are reported to the State Veterinarian within 48 hours; or

(10) Any person employed by the North Carolina Department of Agriculture as a livestock inspector or by the U.S. Department of Agriculture as an animal health technician from performing regular duties assigned to him or her during the course and scope of that person's employment. (1903, c. 503, s. 12; Rev., s. 5438; C.S., s. 6761; 1961, c. 353, s. 9; 1973, c. 1106, s. 1; 1983, c. 891, s. 11; 1993, c. 500, s. 16; 1995, c. 509, s. 43.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted "within" for "with" in subdivision (8).

§ 90-187.12. Unauthorized practice; penalty.

Editor's Note. — Session Laws 1993, c. 539, s. 636, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 12A.

Podiatrists.

§ 90-202.2. "Podiatry" defined.

(a) Podiatry as defined by this Article is the surgical, medical, or mechanical treatment of all ailments of the human foot and ankle, and their related soft tissue structures to the level of the myotendinous junction. Excluded from the definition of podiatry is the amputation of the entire foot, the administration of an anesthetic other than local, and the surgical correction of clubfoot of an infant two years of age or less.

(b) Except for procedures for bone spurs and simple soft tissue procedures, any surgery on the ankle or on the soft tissue structures related to the ankle, any amputations, and any surgical correction of clubfoot shall be performed by a podiatrist only in a hospital licensed under Article 5 of Chapter 131E of the General Statutes or in a multispecialty ambulatory surgical facility that is not a licensed office setting, and that is licensed under Part D of Article 6 of Chapter 131E of the General Statutes. Before performing any of the surgeries referred to in this subsection in a multispecialty ambulatory surgical facility, the podiatrist shall have applied for and been granted privileges to perform this surgery in the multispecialty ambulatory surgical facility. The granting of these privileges shall be based upon the same criteria for granting hospital privileges under G.S. 131E-85.

(c) The North Carolina Board of Podiatry Examiners shall maintain a list of podiatrists qualified to perform the surgeries listed in subsection (b) of this section, along with specific information on the surgical training successfully completed by each licensee. (1919, c. 78, s. 2; C.S., s. 6763; 1945, c. 126; 1963, c. 1195, s. 2; 1971, c. 1211; 1975, c. 672, s. 1; 1995, c. 248, s. 1.)

Editor's Note. —

Session Laws 1995, c. 248, s. 2, provides for a committee to define by rule what constitutes "simple soft tissue procedures" as used in subsection (b).

Effect of Amendments. — The 1995 amendment, effective June 14, 1995, rewrote this section.

§ 90-202.3. Unlawful to practice unless registered.

Editor's Note. — Session Laws 1993, c. 539, s. 637, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-202.12. Free choice by patient guaranteed.

CASE NOTES

Quoted in Cohn v. Wilkes Regional Medical Ctr., 113 N.C. App. 275, 437 S.E.2d 889, cert. denied, 336 N.C. 603, 447 S.E.2d 387 (1994).

Article 13A.

Practice of Funeral Service.

§ 90-210.25. Licensing.

Editor's Note. — Session Laws 1993, c. 539, s. 638, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-210.25A. Minimum burial depth.

When final disposition of a human body entails interment, the top of the uppermost part of the burial vault or other encasement shall be a minimum of 18 inches below the ground surface. This section does not apply to burials where no part of the burial vault or other encasement containing the body is touching the ground. (1995, c. 123, s. 16.)

Editor's Note. — Session Laws 1995, c. 123, s. 17, made this section effective upon ratification. The Act was ratified May 30, 1995.

§ 90-210.29A. Identification of bodies before burial or cremation.

The funeral director or person otherwise responsible for the final disposition of a dead body shall, prior to the interment or entombment of the dead body, affix on the ankle or wrist of the dead body, or, if cremated, on the inside of the vessel containing the remains of the dead body, a tag of durable, noncorroding material permanently marked with the name of the deceased, the date of death, the social security number of the deceased, the county and state of death, and the site of interment or entombment. (1995, c. 312, s. 1.)

Editor's Note. — Session Laws 1995, c. 312, s. 2, made this section effective October 1, 1995.

Article 13C.

Cremations.

§ 90-210.43. Licensing and inspection.

Editor's Note. — Session Laws 1993, c. 539, s. 639, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-210.50. Rulemaking, applicability, violations, and prohibitions of Article.

Editor's Note. — Session Laws 1993, c. 539, s. 640, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 13D.

Funeral and Burial Trust Funds.

§ 90-210.65. Refund of preneed funeral funds.

OPINIONS OF ATTORNEY GENERAL

Courts of Competent Jurisdiction. — All trial divisions within the General Court of Justice are courts of competent jurisdiction for the purposes of subsection (e). See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Revocation of Contract. — In order for a court to revoke an irrevocable preneed funeral contract a civil action must be initiated by the filing of a complaint with the necessary parties being the purchaser, the preneed funeral home licensee and, if other than the purchaser, the preneed funeral contract beneficiary. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

Incompetent Purchaser or Beneficiary. — If a purchaser or beneficiary of a preneed funeral contract has been adjudicated incompetent, the clerk of the superior court is a "court of competent jurisdiction" and a hearing should be held in order for the clerk to make findings establishing that it is in the best interest of the ward to revoke the contract. See opinion of Attorney General to Mr. William R. Hoke, Attorney for the North Carolina State Board of Mortuary Science, — N.C.A.G. — (November 3, 1995).

§ 90-210.67. Application for license.

(a) No person may offer or sell preneed funeral contracts or offer to make or make any funded funeral prearrangements without first securing a license from the Board. Notwithstanding any other provision of law, any person who offers to sell or sells a casket, to be furnished or delivered at a time determinable by the death of the person whose body is to be disposed of in the casket, shall first comply with the provisions of this Article. There shall be two types of licenses: a preneed funeral establishment license and a preneed sales license. Only funeral establishments holding a valid establishment permit pursuant to G.S. 90-210.25(d) shall be eligible for a preneed funeral establishment license. Employees and agents of such entities, upon meeting the qualifications to engage in preneed funeral planning as established by the Board, shall be eligible for a preneed sales license. The Board shall establish the preneed funeral planning activities that are permitted under a preneed sales license. The Board shall adopt rules establishing such qualifications and activities no later than 12 months following the ratification of this act [Session Laws 1991 (Reg. Sess., 1992), c. 901, s. 2]. Preneed sales licensees may sell preneed funeral contracts, prearrangement insurance policies, and make funded funeral prearrangements only on behalf of one preneed funeral establishment licensee; provided, however, they may sell preneed funeral contracts, prearrangement insurance policies, and make funeral prearrangements for any number of licensed preneed funeral establishments that are wholly owned by or affiliated with, through common ownership or contract, the same entity; provided further, in the event they engage in selling prearrangement insurance policies, they shall meet the licensing requirements of the Commissioner of Insurance. Every preneed funeral contract shall be signed by a person licensed as a funeral director or funeral service licensee pursuant to Article 13A of Chapter 90 of the General Statutes.

Application for a license shall be in writing, signed by the applicant and duly verified on forms furnished by the Board. Each application shall contain at least the following: the full names and addresses (both residence and place of business) of the applicant, and every officer and director thereof if the applicant is a partnership, association, or corporation and any other information as the Board shall deem necessary. A preneed funeral establishment license shall be valid only at the address stated in the application or at a new address approved by the Board.

(b) An application for a preneed funeral establishment license shall be accompanied by a nonrefundable application fee of not more than one hundred fifty dollars ($150.00). The Board shall set the amounts of the application fees and renewal fees by rule, but the fees shall not exceed one hundred fifty dollars ($150.00). If the license is granted, the application fee shall be applied to the annual license fee for the first year or part thereof. Upon receipt of the application and payment of the application fee, the Board shall issue a renewable preneed funeral establishment license unless it determines that the applicant has violated any provision of G.S. 90-210.69(c) or has made false statements or representations in the application, or is insolvent, or has conducted or is about to conduct, its business in a fraudulent manner, or is not duly authorized to transact business in this State. Each preneed funeral establishment licensee shall pay annually to the Board on or before June 30 of each year a license renewal fee of not more than one hundred fifty dollars ($150.00).

(c) An application for a preneed sales license shall be accompanied by a nonrefundable application fee of not more than fifty dollars ($50.00). The Board shall set the amounts of the application fees and renewal fees by rule, but the fees shall not exceed fifty dollars ($50.00). If the license is granted, the application fee shall be applied to the annual license fee for the first year or part thereof. Upon receipt of the application and payment of the application fee, the Board shall issue a renewable preneed sales license provided the applicant has met the qualifications to engage in preneed funeral planning as established by the Board unless it determines that the applicant has violated any provision of G.S. 90-210.69(c). Each preneed sales licensee shall pay annually to the Board on or before June 30 of each year, a license renewal fee of not more than fifty dollars ($50.00).

(d) Any person selling a preneed funeral contract, whether funded by a trust deposit or a prearrangement insurance policy, shall remit to the Board, within 10 days of the sale, a fee of fifteen dollars ($15.00) for each sale. The fee shall not be remitted in cash.

(e) The fees collected under this Article, except for monies used pursuant to G.S. 90-210.66, shall be used for the expenses of the Board in carrying out the provisions of this Article. Any funds collected under this Article and remaining with the Board after all expenses under this Article for the current fiscal year have been fully provided for shall be paid over to the General Fund of the State of North Carolina. Provided, however, the Board shall have the right to maintain an amount, the cumulative total of which shall not exceed twenty percent (20%) of gross receipts under this Article for the previous fiscal year of its operations, as a maximum contingency or emergency fund.

(f) Any entity licensed by the Commissioner of Banks under Article 13B of Chapter 90 of the General Statutes before July 9, 1992 shall be entitled to have its license renewed notwithstanding that it is not a funeral establishment, provided it otherwise satisfies the requirements of this Article. (1969, c. 187, s. 5; 1981, c. 671, ss. 16, 17; 1983, c. 657, s. 4; 1985, c. 12, ss. 1, 2; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1995 (Reg. Sess., 1996), c. 665, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, added the second sentence of subsection (a).

§ 90-210.70. Penalties.

(a) Anyone who embezzles or who fraudulently, or knowingly and willfully misapplies, or in any manner converts preneed funeral funds to his own use, or for the use of any partnership, corporation, association, or entity for any purpose other than as authorized by this Article; or anyone who takes, makes away with or secretes, with intent to embezzle or fraudulently or knowingly and willfully misapply or in any manner convert preneed funeral funds for his own use or the use of any other person for any purpose other than as authorized by this Article shall be punished as a Class H felon. Each such embezzlement, conversion, or misapplication shall constitute a separate offense and may be prosecuted individually. Upon conviction, all licenses issued under this Article shall be revoked.

(b) Any person who willfully violates any other provision of this Article shall be guilty of a Class 1 misdemeanor. Each such violation shall constitute a separate offense and may be prosecuted individually.

(c) If a corporation embezzles or fraudulently or knowingly and willfully misapplies or converts preneed funeral funds as provided in subsection (a) hereof or otherwise violates any provision of this Article, the officers, directors, agents, or employees responsible for committing the offense shall be fined or imprisoned as herein provided.

(d) The Board shall have the power to investigate violations of this section and shall deliver all evidence of violations to the district attorney in the county where the offense occurred. The Board shall, with the fees collected under this Article, employ legal counsel and other staff to monitor preneed trusts, investigate complaints, audit preneed trusts, and be responsible for delivering evidences to the district attorney when there is evidence of criminal violation. The record of complaints, auditing, and enforcement shall be presented in an annual report from the Board to the General Assembly. (1969, c. 187, s. 8; 1985, c. 12, s. 1; 1991 (Reg. Sess., 1992), c. 901, s. 2; 1993 (Reg. Sess., 1994), c. 767, s. 28.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 767, which amended this section, in s. 34 provides: "Prosecution for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences."

ARTICLE 15B.

Blood Banks.

§ 90-220.12. Supervision of licensed physician required; penalty for violation.

Editor's Note. — Session Laws 1993, c. 539, s. 641, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 16.

Dental Hygiene Act.

§ 90-233.1. Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 642, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 17.

Dispensing Opticians.

§ 90-251. Licensee allowing unlicensed person to use his certificate or license.

Editor's Note. — Session Laws 1993, c. 539, s. 643, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-252. Engaging in practice without license.

Editor's Note. — Session Laws 1993, c. 539, s. 644, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-255.1. Sale of flammable frames.

Editor's Note. — Session Laws 1993, c. 539, s. 645, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 18A.

Psychology Practice Act.

§ 90-270.2. Definitions.

The following definitions apply in this Article:

(1) Board. — The North Carolina Psychology Board.

(2) Examination. — Any and all examinations that are adopted by the Board and administered to applicants and licensees, including, but not limited to, the national examination, Board-developed examinations, and other examinations that assess the competency and ethics of psychologists and applicants.

(3) Jurisdiction. — Any governmental authority, including, but not limited to, a state, a territory, a commonwealth, a district of the United States, and a country or a local governmental authority thereof, that licenses, certifies, or registers psychologists.

(4) Health services. — Those activities of the practice of psychology that include the delivery of preventive, assessment, or therapeutic intervention services directly to individuals whose growth, adjustment, or functioning is actually impaired or may be at substantial risk of impairment.

(5) Institution of higher education. — A university, a college, a professional school, or another institution of higher learning that:

a. In the United States, is regionally accredited by bodies approved by the Commission on Recognition of Postsecondary Accreditation or its successor.

b. In Canada, holds a membership in the Association of Universities and Colleges of Canada.

c. In another country, is accredited by the comparable official organization having this authority.

(6) Licensed psychologist. — An individual to whom a license has been issued pursuant to the provisions of this Article, whose license is in force and not suspended or revoked, and whose license permits him or her to engage in the practice of psychology as defined in this Article.

(7) Licensed psychological associate. — An individual to whom a license has been issued pursuant to the provisions of this Article, whose license is in force and not suspended or revoked, and whose license permits him or her to engage in the practice of psychology as defined in this Article.

(8) Practice of psychology. — The observation, description, evaluation, interpretation, or modification of human behavior by the application of psychological principles, methods, and procedures for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior or of enhancing interpersonal relationships, work and life adjustment, personal effectiveness, behavioral health, or mental health. The practice of psychology includes, but is not limited to: psychological testing and the evaluation or assessment of personal characteristics such as intelligence, personality, abilities, interests, aptitudes, and neuropsychological functioning; counseling, psychoanalysis, psychotherapy, hypnosis, biofeedback, and behavior analysis and therapy; diagnosis and treatment of mental and emotional disorder or disability, alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological aspects of physical illness, accident, injury, or disability; and psychoeducational evaluation, therapy, remediation, and consultation. Psychological services may be rendered to individuals, families, groups, and the public. The practice of psychology shall be construed within the meaning of this definition without regard to whether payment is received for services rendered.

(9) Psychologist. — A person represents himself or herself to be a psychologist if that person uses any title or description of services incorporating the words “psychology”, “psychological”, “psychologic”, or “psychologist”, states that he or she possesses expert qualification in any area of psychology, or provides or offers to provide services defined as the practice of psychology in this Article. All persons licensed under this Article may present themselves as psychologists, as may those persons who are exempt by G.S. 90-270.4 and those who are qualified applicants under G.S. 90-270.5. (1967, c. 910, s. 2; 1977, c. 670, s. 1; 1979, c. 670, s. 1; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 569, s. 14.)

§ 90-270.4. Exemptions to this Article.

(a) Nothing in this Article shall be construed to prevent the teaching of psychology, the conduct of psychological research, or the provision of psychological services or consultation to organizations or institutions, provided that such teaching, research, service, or consultation does not involve the delivery or supervision of direct psychological services to individuals or groups of individuals who are themselves, rather than a third party, the intended beneficiaries of such services, without regard to the source or extent of payment for services rendered. Nothing in this Article shall prevent the provision of expert testimony by psychologists who are otherwise exempted by this act. Persons holding an earned master’s, specialist, or doctoral degree in psychology from an institution of higher education may use the title “psychologist” in activities permitted by this subsection.

(b) Nothing in this Article shall be construed as limiting the activities, services, and use of official titles on the part of any person in the regular employ of the State of North Carolina or whose employment is included under the State Personnel Act who has served in a position of employment involving the practice of psychology as defined in this Article, provided that the person was serving in this capacity on December 31, 1979.

(c) Persons certified by the State Board of Education as school psychologists and serving as regular salaried employees of the Department of Public Instruction or local boards of education are not required to be licensed under this Article in order to perform the duties for which they serve the Department of Public Instruction or local boards of education, and nothing in this Article shall be construed as limiting their activities, services, or titles while performing those duties for which they serve the Department of Public Instruction or local boards of education. If a person certified by the State Board of Education as a school psychologist and serving as a regular salaried employee of the Department of Public Instruction or a local board of education is or becomes a licensed psychologist under this Article, he or she shall be required to comply with all conditions, requirements, and obligations imposed by statute or by Board rules upon all other licensed psychologists as a condition to retaining that license. Other provisions of this Article notwithstanding, if a person certified by the State Board of Education as a school psychologist and serving as a regular salaried employee of the Department of Public Instruction or a local board of education is or becomes a licensed psychological associate under this Article, he or she shall not be required to comply with the supervision requirements otherwise applicable to licensed psychological associates by Board rules or by this Article in the course of his or her regular salaried employment with the Department of Public Instruction or a local board of education, but he or she shall be required to comply with all other conditions, requirements, and obligations imposed by statute or a local board of education or by Board rules upon all other licensed psychological associates as a condition to retaining that license.

(d) Nothing in this Article shall be construed as limiting the activities, services, and use of title designating training status of a student, intern, fellow, or other trainee preparing for the practice of psychology under the supervision and responsibility of a qualified psychologist in an institution of higher education or service facility, provided that such activities and services constitute a part of his or her course of study as a matriculated graduate student in psychology. For individuals pursuing postdoctoral training or experience in psychology, nothing shall limit the use of a title designating training status, but the Board may develop rules defining qualified supervision, disclosure of supervisory relationships, frequency of supervision, settings to which trainees may be assigned, activities in which trainees may engage, qualifications for trainee status, nature of responsibility assumed by the supervisor, and the structure, content, and organization of postdoctoral experience.

(e) Nothing in this Article shall be construed to prevent qualified members of other professional groups from rendering services consistent with their professional training and code of ethics, provided they do not hold themselves out to the public by any title or description stating or implying that they are psychologists or are licensed, certified, or registered to practice psychology.

(f) Nothing in this Article is to be construed as prohibiting a psychologist who is not a resident of North Carolina who holds an earned doctoral, master's, or specialist degree in psychology from an institution of higher education, and who is licensed or certified only in another jurisdiction, from engaging in the practice of psychology, including the provision of health services, in this State for up to five days in any calendar year. All such psychologists shall comply with supervision requirements established by the Board, and shall notify the Board in writing of their intent to practice in North Carolina, prior to the provision of any services in this State. The Board shall adopt rules implementing and defining this provision.

(g) Except as otherwise provided in this Article, if a person exempt from the provisions of this Article and not required to be licensed under this Article is or becomes licensed under this Article, he or she shall be required to comply with all conditions, requirements, and obligations imposed by Board rules or by statute upon all other psychologists licensed under this Article.

(h) A licensee whose license is suspended or revoked pursuant to the provisions of G.S. 90-270.15, or an applicant who is notified that he or she has failed an examination for the second time, as specified in G.S. 90-270.5(b), or an applicant who is notified that licensure is denied pursuant to G.S. 90-270.11 or G.S. 90-270.15, or an applicant who discontinues the application process at any point must terminate the practice of psychology, in accordance with the duly adopted rules of the Board. (1967, c. 910, s. 4; 1977, c. 670, s. 3; 1979, c. 670, ss. 3, 4; c. 1005, s. 1; 1981, c. 654, ss. 1, 2; 1983, c. 82, s. 5; 1985, c. 734, ss. 1-3; 1993, c. 375, s. 1; 1995, c. 509, s. 44.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "course of" following "a part of his" in the first sentence of subsection (d).

§ 90-270.6. Psychology Board; appointment; term of office; composition.

Editor's Note. — Session Laws 1993, c. 375, which amended this section, in s. 7, as amended by Session Laws 1993 (Reg. Sess., 1994) c. 569, s. 15, provides: "This act becomes effective October 1, 1993. The Governor shall implement the requirement under G.S. 90-270.6 that Board members reside in different congressional districts by taking this factor into account when filling vacancies on or after July 1, 1995, and when making appointments to terms that commence on or after July 1, 1995."

§ 90-270.9. Election of officers; meetings; adoption of seal and appropriate rules; powers of the Board.

CASE NOTES

Records of Psychologist. — This section permits only the North Carolina State Board of Examiners of Practicing Psychologists to require submission of confidential patient records in the instance of ethics complaints against a psychologist. The rules of the North Carolina Psychological Association do not require disclosure of confidential client information by members without the client's consent. Sultan v. State Bd. of Exmrs. of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

The presence or absence of psychological-patient privilege is irrelevant to psychologist's general professional obligation to maintain the confidentiality of client information, subject to this section, in a non-courtroom setting. Sultan v. State Bd. of Exmrs. of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

§ 90-270.11. Licensure; examination; foreign graduates.

(a) Licensed Psychologist. — The Board shall issue a permanent license to practice psychology to any applicant who pays an application fee and any applicable examination fee as specified in G.S. 90-270.18(b), who passes an examination in psychology as prescribed by the Board, and who submits evidence verified by oath and satisfactory to the Board that he or she:

(1) Is at least 18 years of age;
(2) Is of good moral character;
(3) Has received a doctoral degree based on a planned and directed program of studies in psychology from an institution of higher education. The degree program, wherever administratively housed, must be publicly identified and clearly labeled as a psychology program. The Board shall adopt rules implementing and defining these provisions, including, but not limited to, such factors as residence in the educational program, internship and related field experiences, number of course credits, course content, numbers and qualifications of faculty, and program identification and identity.
(4) Has had at least two years of acceptable and appropriate supervised experience germane to his or her training and intended area of practice as a psychologist as specified in G.S. 90-270.5(d).

(b) Licensed Psychological Associate. —

(1) The Board shall issue a permanent license to practice psychology to any applicant who pays an application fee and any applicable examination fee as specified in G.S. 90-270.18(b), who passes an examination in psychology as prescribed by the Board, and who submits evidence verified by oath and satisfactory to the Board that he or she:
  a. Is at least 18 years of age;
  b. Is of good moral character;
  c. Has received a master's degree in psychology or a specialist degree in psychology from an institution of higher education. The degree program, wherever administratively housed, must be publicly identified and clearly labeled as a psychology program. The Board shall adopt rules implementing and defining these provisions, including, but not limited to, such factors as residence in the program, internship and related field experiences, number of course credits, course content, numbers and qualifications of faculty, and program identification and identity.
(2) Notwithstanding the provisions of this subsection, a licensed psychologist applicant who has met all requirements for licensure except passing the examination at the licensed psychologist level, may be issued a license as a licensed psychological associate without having a master's degree or specialist degree in psychology if the applicant passes the examination at the licensed psychological associate level.

(c) Foreign Graduates. — Applicants trained in institutions outside the United States, applying for licensure at either the licensed psychologist or licensed psychological associate level, must show satisfactory evidence of training and degrees substantially equivalent to those required of applicants trained within the United States, pursuant to Board rules and regulations.

(d) Prior Licensure. — A person who is licensed in good standing as a licensed practicing psychologist or psychological associate under the provisions of the Practicing Psychologist Licensing Act in effect immediately prior to the ratification of this Psychology Practice Act shall be deemed, as of October 1, 1993 to have met all requirements for licensure under this act and shall be eligible for renewal of licensure in accordance with the provisions of this act. (1967, c. 910, s. 11; 1971, c. 889, ss. 2, 3; 1975, c. 675, ss. 1, 2; 1977, c. 670, s. 7; 1979, c. 670, ss. 5, 6; 1979, 2nd Sess., c. 1176; 1981, c. 738, ss. 1, 2; 1983, c. 37, ss. 1, 2; c. 82, s. 4; 1985, c. 734, s. 7; 1987, c. 326, ss. 1, 2; c. 500, s. 1; 1989, c. 554; 1993, c. 375, s. 1; 1995, c. 509, s. 45.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, deleted "who" preceding "who passes an examination" in subsection (a).

CASE NOTES

Stated in Reich v. Price, 110 N.C. App. 255, 429 S.E.2d 372 (1993).

§ 90-270.15. Denial, suspension, or revocation of licenses and health services provider certification, and other disciplinary and remedial actions for violations of the Code of Conduct; relinquishing of license.

(a) Any applicant for licensure or health services provider certification and any person licensed or certified under this Article shall have behaved in conformity with the ethical and professional standards specified in this Code of Conduct and in the rules of the Board. The Board may deny, suspend, or revoke licensure and certification, and may discipline, place on probation, limit practice, and require examination, remediation, and rehabilitation, or any combination thereof, all as provided for in subsection (b) below. The Board shall act upon proof that the applicant or licensee engaged in illegal, immoral, dishonorable, unprofessional, or unethical conduct by violating any of the provisions of the Code of Conduct as follows:

(1) Has been convicted of a felony or entered a plea of guilty or nolo contendere to any felony charge;

(2) Has been convicted of or entered a plea of guilty or nolo contendere to any misdemeanor involving moral turpitude, misrepresentation or fraud in dealing with the public, or conduct otherwise relevant to fitness to practice psychology, or a misdemeanor charge reflecting the inability to practice psychology with due regard to the health and safety of clients or patients;

(3) Has engaged in fraud or deceit in securing or attempting to secure or renew a license or in securing or attempting to secure health services provider certification under this Article or has willfully concealed from the Board material

information in connection with application for a license or health services provider certification, or for renewal of a license under this Article;

(4) Has practiced any fraud, deceit, or misrepresentation upon the public, the Board, or any individual in connection with the practice of psychology, the offer of psychological services, the filing of Medicare, Medicaid, or other claims to any third party payor, or in any manner otherwise relevant to fitness for the practice of psychology;

(5) Has made fraudulent, misleading, or intentionally or materially false statements pertaining to education, licensure, license renewal, certification as a health services provider, supervision, continuing education, any disciplinary actions or sanctions pending or occurring in any other jurisdiction, professional credentials, or qualifications or fitness for the practice of psychology to the public, any individual, the Board, or any other organization;

(6) Has had a license or certification for the practice of psychology in any other jurisdiction suspended or revoked, or has been disciplined by the licensing or certification board in any other jurisdiction for conduct which would subject him or her to discipline under this Article;

(7) Has violated any provision of this Article or of the duly adopted rules of the Board;

(8) Has aided or abetted the unlawful practice of psychology by any person not licensed by the Board;

(9) For a licensed psychologist, has provided health services without health services provider certification;

(10) Has been guilty of immoral, dishonorable, unprofessional, or unethical conduct as defined in this subsection, or in the then-current code of ethics of the American Psychological Association, except as the provisions of such code of ethics may be inconsistent and in conflict with the provisions of this Article, in which case, the provisions of this Article control;

(11) Has practiced psychology in such a manner as to endanger the welfare of clients or patients;

(12) Has demonstrated an inability to practice psychology with reasonable skill and safety by reason of illness, inebriation, misuse of drugs, narcotics, alcohol, chemicals, or any other substance affecting mental or physical functioning, or as a result of any mental or physical condition;

(13) Has practiced psychology or conducted research outside the boundaries of demonstrated competence or the limitations of education, training, or supervised experience;

(14) Has failed to use, administer, score, or interpret psychological assessment techniques, including interviewing and observation, in a competent manner, or has provided findings or recommendations which do not accurately reflect the assessment data, or exceed what can reasonably be inferred, predicted, or determined from test, interview, or observational data;

(15) Has failed to provide competent diagnosis, counseling, treatment, consultation, or supervision, in keeping with standards of usual and customary practice in this State;

(16) In the absence of established standards, has failed to take all reasonable steps to ensure the competence of services;

(17) Has failed to maintain a clear and accurate case record which documents the following for each patient or client:
  a. Presenting problems, diagnosis, or purpose of the evaluation, counseling, treatment, or other services provided;
  b. Fees, dates of services, and itemized charges;
  c. Summary content of each session of evaluation, counseling, treatment, or other services, except that summary content need not include specific information that may cause significant harm to any person if the information were released;
  d. Test results or other findings, including basic test data; and
  e. Copies of all reports prepared;

(18) Except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record for at least seven years from the date of the last provision of psychological services; or, except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record for three years from the date of the attainment of majority age by the patient or client or for at least seven years from the date of the last provision of psychological services, whichever is longer; or, except when prevented from doing so by circumstances beyond the psychologist's control, has failed to retain securely and confidentially the complete case record indefinitely if there are pending legal or ethical matters or if there is any other compelling circumstance;

(19) Has failed to cooperate with other psychologists or other professionals to the potential or actual detriment of clients, patients, or other recipients of service, or has behaved in ways which substantially impede or impair other psychologists' or other professionals' abilities to perform professional duties;

(20) Has exercised undue influence in such a manner as to exploit the client, patient, student, supervisee, or trainee for the financial or other personal advantage or gratification of the psychologist or a third party;

(21) Has harassed or abused, sexually or otherwise, a client, patient, student, supervisee, or trainee;

(22) Has failed to cooperate with or to respond promptly, completely, and honestly to the Board, to credentials committees, or to ethics committees of professional psychological associations, hospitals, or other health care organizations or educational institutions, when those organizations or entities have jurisdiction; or has failed to cooperate with institutional review boards or professional standards review organizations, when those organizations or entities have jurisdiction; or

(23) Has refused to appear before the Board after having been ordered to do so in writing by the Chair;

(b) Upon proof that an applicant or licensee under this Article has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of denial, suspension, or revocation, issue a formal reprimand or formally censure the applicant or licensee, may place the applicant or licensee upon probation with such appropriate conditions upon the continued practice as the Board may deem advisable, may require examination, remediation, or rehabilitation for the applicant or licensee, including care, counseling, or treatment by a professional or professionals designated or approved by the Board, the expense to be borne by the applicant or licensee, may require supervision for the services provided by the applicant or licensee by a licensee designated or approved by the Board, the expense to be borne by the applicant or licensee, may limit or circumscribe the practice of psychology provided by the applicant or licensee with respect to the extent, nature, or location of the services provided, as the Board deems advisable, or may discipline and impose any appropriate combination of the foregoing. In addition, the Board may impose such conditions of probation or restrictions upon continued practice at the conclusion of a period of suspension or as requirements for the restoration of a revoked or suspended license. In lieu of or in connection with any disciplinary proceedings or investigation, the Board may enter into a consent order relative to discipline, supervision, probation, remediation, rehabilitation, or practice limitation of a licensee or applicant for a license.

(c) The Board may assess costs of disciplinary action against an applicant or licensee found to be in violation of this Article.

(d) When considering the issue of whether or not an applicant or licensee is physically or mentally capable of practicing psychology with reasonable skill and safety with patients or clients, then, upon a showing of probable cause to the Board that the applicant or licensee is not capable of practicing psychology with reasonable skill and safety with patients or clients, the Board may petition a court of competent jurisdiction to order the applicant or licensee in question to submit to a psychological evaluation by a psychologist to determine psychological status or a physical evaluation by a physician to determine physical condition, or both. Such psychologist or physician shall be designated by the court. The expenses of such evaluations shall be borne by the Board. Where the applicant or licensee raises the issue of mental or physical competence or appeals a decision regarding mental or physical competence, the applicant or licensee shall be permitted to obtain an evaluation at the applicant's or licensee's expense. If the Board suspects the objectivity or adequacy of the evaluation, the Board may compel an evaluation by its designated practitioners at its own expense.

(e) Except as provided otherwise in this Article, the procedure for revocation, suspension, denial, limitations of the license or health services provider certification, or other disciplinary, remedial, or rehabilitative actions, shall be in accordance with the provisions of Chapter 150B of the General Statutes. The Board is required to provide the opportunity for a hearing under Chapter 150B to any applicant whose license or health services provider certification is denied or to whom licensure or health services provider certification is offered subject to any restrictions, probation, disciplinary action, remediation, or other conditions or limitations, or to any licensee before revoking, suspending, or restricting a license or health services provider certificate or imposing any other disciplinary action or remediation. If the applicant or licensee waives the opportunity for a hearing, the Board's denial, revocation, suspension, or other proposed action becomes final without a hearing's having been conducted. Notwithstanding the foregoing, no applicant or licensee is entitled to a hearing for failure to pass an examination. In any proceeding before the Board, in any record of any hearing before the Board, in any complaint or notice of charges against any licensee or applicant for licensure, and in any decision rendered by the Board, the Board may withhold from public disclosure the identity of any clients or patients who have not consented to the public disclosure of psychological services' having been provided by the licensee or applicant. The Board may close a hearing to the public and receive in closed session evidence involving or concerning the treatment of or delivery of psychological services to a client or a patient who has not consented to the public disclosure of such treatment or services as may be necessary for the protection and rights of such patient or client of the accused applicant or licensee and the full presentation of relevant evidence. All records, papers, and other documents containing information collected and compiled by or on behalf of the Board, as a result of investigations, inquiries, or interviews conducted in connection with licensing or disciplinary matters will not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee or applicant, or any notice to any licensee or applicant of a hearing in any proceeding, or any decision rendered in connection with a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of such investigation, inquiry, or hearing except that identifying information concerning the treatment of or delivery of services to a patient or client who has not consented to the public disclosure of such treatment or services may be deleted; and provided, further, that if any such record, paper, or other document containing information theretofore collected and compiled by or on behalf of the Board, as hereinbefore provided, is received and admitted in evidence in any hearing before the Board, it shall thereupon be a public record within the meaning of Chapter 132 of the General Statutes, subject to any deletions of identifying information concerning the treatment of or delivery of psychological services to a patient or client who has not consented to the public disclosure of such treatment or services.

(f) A license and a health services provider certificate issued under this Article are suspended automatically by operation of law after failure to renew a license for a period of more than sixty days after the renewal date. The Board may reinstate a license and a health services provider certificate suspended under this subsection upon payment of a fee as specified in G.S. 90-270.18(b), and may require that the applicant file a new application, furnish new supervisory reports or references or otherwise update his or her credentials, or submit to examination for reinstatement. Notwithstanding any provision to the contrary, the Board retains full jurisdiction to investigate alleged violations of this Article by any person whose license is suspended under this subsection and, upon proof of any violation of this Article by any such person, the Board may take disciplinary action as authorized by this section.

(g) A person whose license or health services provider certification has been denied or revoked may reapply to the Board for licensure or certification after the passage of one calendar year from the date of such denial or revocation.

(h) A licensee may, with the consent of the Board, voluntarily relinquish his or her license or health services provider certificate at any time. The Board may delay or refuse the granting of its consent as it may deem necessary in order to investigate any pending complaint, allegation, or issue regarding violation of any provision of this Article by the licensee. Notwithstanding any provision to the contrary, the Board retains full jurisdiction to investigate alleged violations of this Article by any person whose license is relinquished under this subsection and, upon proof of any violation of this Article by any such person, the Board may take disciplinary action as authorized by this section.

(i) The Board may adopt such rules as it deems reasonable and appropriate to interpret and implement the provisions of this section. (1967, c. 910, s. 15; 1973, c. 1331, s. 3; 1977, c. 670, s. 9; 1979, c. 1005, s. 4; 1985, c. 734, s. 9; 1987, c. 827, s. 1; 1991, c. 239, s. 1; c. 761, ss. 14-16; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 570, s. 7.)

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

CASE NOTES

Authority. — The General Assembly has given to the North Carolina State Board of Examiners of Practicing Psychologists (Board), not the North Carolina Psychological Association (NCPA), both the authority and the responsibility to police the conduct of psychologists in North Carolina. Sultan v. State Bd. of Exmrs. of Practicing Psychologists, 121 N.C. App. 739, 468 S.E.2d 443 (1996).

§ 90-270.16. Prohibited acts.

CASE NOTES

Cited in State v. Clemmons, 111 N.C. App. 569, 433 S.E.2d 748 (1993).

§ 90-270.17. Violations and penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 646, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-270.20. Provision of health services; certification as health services provider.

(a) Health services, as defined in G.S. 90-270.2(4) and G.S. 90-270.2(8), may be provided by qualified licensed psychological associates, qualified licensed psychologists holding provisional, temporary, or permanent licenses, or qualified applicants. Qualified licensed psychological associates, qualified licensed psychologists holding provisional or temporary licenses, or qualified applicants may provide health services only under supervision as specified in the duly adopted rules of the Board.

(b) After January 1, 1995, any licensed psychologist who is qualified by education, who holds permanent licensure and a doctoral degree, and who provides or offers to provide health services to the public must be certified as a health services provider psychologist (HSP-P) by the Board. The Board shall certify as health services provider psychologists those applicants who shall demonstrate at least two years of acceptable supervised health services experience, of which at least one year is postdoctoral. The Board shall specify the format, setting, content, and organization of the supervised health services experience or program. The Board may, upon verification of supervised experience and the meeting of all requirements as a licensed psychologist, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(c) After January 1, 1995, any licensed psychological associate who is qualified by education may be granted certification as a health services provider psychological associate (HSP-PA). The Board may, upon verification of qualifications and the meeting of all requirements as a licensed psychological associate, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(d) After January 1, 1995, any licensed psychologist holding a provisional license who is qualified by education may be granted certification as a health services provider psychologist (provisional) (HSP-PP) by the Board. The Board may, upon verification of qualifications and the meeting of all requirements for a provisional license, issue the license and certificate simultaneously. An application fee, as specified in G.S. 90-270.18(b)(9), must be paid.

(e) Notwithstanding the provisions of subsection (b) of this section, if application is made to the Board before June 30, 1994, by a licensed psychologist who is listed in the National Register of Health Services Providers in Psychology, or who holds permanent licensure and who can demonstrate that he or she has been engaged acceptably in the provision of health services for two years or its equivalent, that licensed psychologist shall be certified as a health services provider psychologist. The applicant, in order to demonstrate two years of acceptable experience or its equivalent, must meet one of the following conditions:

(1) The applicant is a diplomate in good standing of the American Board of Professional Psychology in any of the areas of professional practice deemed appropriate by the Board;
(2) The applicant has the equivalent of two years of acceptable full-time experience, one of which was postdoctoral, at sites where health services are provided;
(3) The applicant submits evidence satisfactory to the Board demonstrating that he or she has been engaged acceptably for the equivalent of at least two years full-time in the provision of health services; or
(4) Any other conditions that the Board may deem acceptable.

(f) Notwithstanding the provisions of subsection (c) of this section, if application is made to the Board before June 30, 1994, by a licensed psychological associate who can demonstrate that he or she has been engaged acceptably in the provision of health services under supervision for two years or its equivalent, that licensed psychological associate shall be certified as a health services provider psychological associate.

(g) The Board shall have the authority to deny, revoke, or suspend the health services provider certificate issued pursuant to these subsections upon a finding that the psychologist has not behaved in conformity with the ethical and professional standards prescribed in G.S. 90-270.15. (1985, c. 734, s. 10; 1993, c. 375, s. 1; 1993 (Reg. Sess., 1994), c. 569, s. 13.)

ARTICLE 18B.

Physical Therapy.

§ 90-270.35. Unlawful practice.

Except as otherwise authorized in this Article, if any person, firm, or corporation shall:

(1) Practice, attempt to practice, teach, consult, or supervise in physical therapy, or hold out any person as being able to do any of these things in this State, without first having obtained a license or authorization from the Board for the person performing services or being so held out;

(2) Use in connection with any person's name any letters, words, numerical codes, or insignia indicating or implying that the person is a physical therapist or physical therapist assistant, or applicant with "Graduate" status, unless the person is licensed or authorized in accordance with this Article;

(3) Practice or attempt to practice physical therapy with a revoked, lapsed, or suspended license;

(4) Practice physical therapy and fail to refer to a licensed medical doctor or dentist any patient whose medical condition should have, at the time of evaluation or treatment, been determined to be beyond the scope of practice of a physical therapist;

(5) Aid, abet, or assist any unlicensed person to practice physical therapy in violation of this Article; or

(6) Violate any of the provisions of this Article;

said person, firm, or corporation shall be guilty of a Class 1 misdemeanor. Each act of such unlawful practice shall constitute a distinct and separate offense. (1951, c. 1131, ss. 9, 11; 1969, c. 556; 1979, c. 487; 1985, c. 701, s. 1; 1993, c. 539, s. 647; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — This section has been set out to correct a printing error in the main pamphlet.

Session Laws 1993, c. 539, s. 647, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

OPINIONS OF ATTORNEY GENERAL

A podiatrist may prescribe or refer physical therapy to a licensed physical therapist for the benefit of the podiatrist's patients. See opinion of Attorney General to Mr. E. Joseph Daniels, D.P.M., AACFS, President, North Carolina Board of Podiatry Examiners, 52 N.C.A.G. 70 (1982).

ARTICLE 18C.

Marriage and Family Therapy Licensure.

§ 90-270.45. Title of Article.

This Article shall be known as the "Marriage and Family Therapy Licensure Act." (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 1 provides: "This act shall be known and may be cited as the 'Marriage and Family Therapy Licensure Act of 1993.'"

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 3 provides: "All members of the North Carolina Marital and Family Therapy Certification Board shall continue to be members of the North Carolina Marriage and Family Therapy Licensure Board until the expiration of their terms as members of the North Carolina Marital and Family Therapy Certification Board."

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 4 provides: "(a) The North Carolina Marriage and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] shall continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Marriage and Family Therapy Licensure Act" for "Marital and Family Therapy Certification Act" in the article heading and in this section.

§ 90-270.46. Policy and purpose.

Marriage and family therapy in North Carolina is a professional practice that affects the public safety and welfare and requires appropriate licensure and control in the public interest.

It is the purpose of this Article to establish a licensure agency, a structure, and procedures that will (i) ensure that the public has a means of protecting itself from the practice of marriage and family therapy by unprofessional, unauthorized, and unqualified individuals, and (ii) protect the public from unprofessional, improper, unauthorized and unqualified use of certain titles by persons who practice marriage and family therapy. This Article shall be liberally construed to carry out these policies and purposes. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the first paragraph substituted "Marriage" for "Marital," deleted "the State of" preceding "North Carolina," deleted "declared to be" preceding "a professional practice," substituted "that affects" for "which affects," and substituted "licensure" for "certification"; in the second paragraph, in the first sentence, substituted "licensure" for "certification," substituted "that" for "which", inserted "(i)," inserted "the practice of marriage and family therapy by unprofessional, unauthorized, and unqualified individuals, and (ii) protect the public from," and substituted "marriage" for "marital."

§ 90-270.47. Definitions.

As used in this Article, unless the context clearly requires a different meaning:

(1) "Allied mental health field" and "degree" mean:
  a. Master's or doctoral degree in clinical social work;
  b. Master's or doctoral degree in psychiatric nursing;
  c. Master's or doctoral degree in counseling or clinical or counseling psychology;
  d. Doctor of medicine or doctor of osteopathy degree with an appropriate residency training in psychiatry; or
  e. Master's or doctoral degree in any mental health field the course of study of which is equivalent to the master's degree in marriage and family therapy.

(2) "Board" means the North Carolina Marriage and Family Therapy Licensure Board.

(3) "Licensed marriage and family therapist" means a person to whom a license has been issued pursuant to this Article, if the license is in force and not suspended or revoked.

(3a) "Marriage and family therapy" is the clinical practice, within the context of marriage and family systems, of the diagnosis and treatment of psychosocial aspects of mental and emotional disorders. Marriage and family therapy involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to families, couples, and individuals for the purpose of treating these diagnosed mental and emotional disorders. Marriage and family therapy includes referrals to and collaboration with other health care professionals when appropriate.

(4) "Practice of marriage and family therapy" means the rendering of professional marriage and family therapy services to individuals, couples, or families, singly or in groups, whether the services are offered directly to the general public or through organizations, either public or private, for a fee, monetary or otherwise.

(5) "Recognized educational institution" means any educational institution that grants a bachelor's, master's, or doctoral degree and is recognized by the Board and by a nationally or regionally recognized educational or professional accrediting body. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in subdivision (1)c. substituted "Master's or doctoral" for "Doctoral" and inserted "counseling or"; in subdivision (1)e. deleted "wherein" preceding "the course of," inserted "of which," and substituted "marriage" for "marital"; in subdivision (2) substituted "Marriage and Family Therapy Licensure" for "Marital and Family Therapy Certification"; in subdivision (3) substituted "Licensed marriage" for "Certified marital," substituted "license" for "certificate," deleted "the provisions of" preceding "this Article," substituted "if the license" for "which certificate," and deleted from the end " as of the particular time in question"; added subdivision (3a); in subdivision (4) substituted "marriage" for "marital" twice, deleted "or counseling" preceding "services to individuals," substituted "couples, or families" for "family groups and marital pairs," substituted "the services" for "such services," and deleted the definition of marital and family therapy; and in subdivision (5) substituted "that grants" for "which grants," substituted "doctoral" for "doctor's," deleted "which" preceding "is recognized," and substituted "and by" for "or by."

§ 90-270.48. Prohibited acts.

Except as specifically provided elsewhere in this Article, it is unlawful for a person not licensed as a marriage and family therapist under this Article to practice marriage or family therapy or hold himself or herself out to the public as a person practicing marriage and family therapy. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "it is unlawful for a person not licensed as a marriage and family therapist under this Article to practice marriage or family therapy or hold himself or herself out to the public as a person practicing marriage and family therapy" for "commencing January 1, 1980, no person who is not certified under this Article shall use a title or description such as 'certified marital or marriage therapist, counselor, advisor, or consultant,' 'certified marital or marriage and family therapist, counselor, advisor or consultant,' or any other name, style or description denoting that the person is a certified marital and family therapist. Nothing herein shall prohibit any person from advertising the performance of marital and family therapy or counseling services, the persons from whom it may be obtained and prices."

§ 90-270.48A. Exemptions.

(a) This Article does not prevent members of the clergy or licensed, certified, or registered members of professional groups recognized by the Board from advertising or performing services consistent with their own profession. Members of the clergy include, but are not limited to, persons who are ordained, consecrated, commissioned, or endorsed by a recognized denomination, church, faith group, or synagogue. Professional groups the Board shall recognize include, but are not limited to, certified social workers, licensed professional counselors, fee- based pastoral counselors, licensed practicing psychologists, psychological associates, physicians, and attorneys-at-law. However, in no event may a person use the title "Licensed Marriage and Family Therapist," use the letters "LMFT," or in any way imply that the person is a licensed marriage and family therapist unless the person is licensed as such under this Article.

(b) A person is exempt from the requirements of this Article if any of the following conditions are met:

(1) The person is (i) preparing for the practice of marriage and family therapy in a manner prescribed by rules of the Board, (ii) under qualified supervision in a training institution or facility or supervisory arrangement recognized and approved by the Board, and (iii) designated by a title

such as "marriage and family therapy intern," or "marriage and family therapy supervisee," or another similar title approved by the Board.

(2) The person is practicing marriage and family therapy as an employee of a recognized educational institution, or a governmental institution or agency and the practice is included in the duties for which the person was employed by the institution or agency.

(3) The person is practicing marriage and family therapy as an employee of a nonprofit organization which the Board has determined meets community needs and the practice is included in the duties for which the person was employed by the nonprofit organization.

(4) The person is practicing marriage and family therapy as an employee of a hospital licensed under Article 5 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes. Provided, however, no such person shall hold himself out as a licensed marriage and family therapist. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5, made this section effective January 1, 1995.

§ 90-270.48B. Third-party reimbursement.

Nothing in this Article shall be construed to require direct third-party reimbursement to persons licensed under this Article. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5, made this section effective January 1, 1995.

§ 90-270.49. North Carolina Marriage and Family Therapy Licensure Board.

(a) Establishment. — There is established as an agency of the State of North Carolina the North Carolina Marriage and Family Therapy Licensure Board, which shall be composed of seven Board members to be appointed as provided in G.S. 90-270.50. Board members shall be appointed for terms of four years each, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the Board member whom he shall succeed. Upon the expiration of a Board member's term of office, the Board member shall continue to serve until a successor has qualified. No person may be appointed more than once to fill an unexpired term or for more than two consecutive full terms. The Governor shall designate one Board member to serve as chairperson of the Board. No person may serve as chairperson for more than four years.

The Governor may remove any member from the Board or remove the chairperson from the position of chairperson only for neglect of duty, malfeasance, or conviction of a felony or crime of moral turpitude while in office.

No Board member shall participate in any matter before the Board in which the member has a pecuniary interest, personal bias, or other similar conflict of interest.

(b) Quorum and Principal Office. — Four of the members of the Board shall constitute a quorum of the Board. The Board shall specify the principal office of the Board within this State.

(c) Repealed by Session Laws 1995 (Reg. Sess., 1994), c. 564, s. 2, effective January 1, 1995. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 3 provides: "All members of the North Carolina Marital and Family Therapy Certification Board shall continue to be members of the North Carolina Marriage and Family Therapy Licensure Board until the expiration of their terms as members of the North Carolina Marital and Family Therapy Certification Board."

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 4 provides: "(a) The North Carolina Marriage and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] shall continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Marriage and Family Therapy Licensure" for "Marital and Family Therapy Certification" in the section catchline and in the first sentence of subsection (a); in subsection (a), in the first paragraph, in the first sentence, deleted "hereby," deleted "one of which shall be designated as chairperson" following "members," substituted "as provided" for "in the manner provided for," deleted the former second sentence which read "Of the first Board members appointed, three shall continue in office for two years, two for three years, and two, including the chairperson for four years, respectively," in the present second sentence substituted "Board members" for "Their successors," in the present third sentence substituted "a Board member's" for "his," substituted "the Board member" for "a Board member," and substituted "a successor has" for "his successor shall have been appointed and shall have," in the present fourth sentence inserted "for," in the present fifth sentence deleted "during the term" following "chairperson" and deleted "his appointment to" preceding "the Board," in the second paragraph substituted "from the Board or remove" for "of the Board or," substituted "the position of chairperson only" for "his position as chairperson," substituted "duty, malfeasance, or" for "duty or malfeasance or," deleted "but for no other reason," and in the third paragraph substituted "the member" for "he"; in subsection (b) in the second sentence inserted "Board shall specify the," and substituted "within this State" for "shall be at such location in the State of North Carolina as the Board shall from time to time specify"; and deleted subsection (c) regarding Board employees.

§ 90-270.50. Appointment and qualification of Board members.

(a) Nominations for Appointment. — The Governor shall appoint members of the Board only from among the candidates who meet the following qualifications:

(1) Four members shall be practicing marriage and family

therapists who are licensed marriage and family therapists in the State at the time of their appointment, each of whom has been for at least five years immediately preceding appointment actively engaged as a marriage and family therapist in rendering professional services in marriage and family therapy, or in the education and training of graduate or postgraduate students of marriage and family therapy, and has spent the majority of the time devoted to this activity in this State during the two years preceding appointment.

(2) Three members shall be representatives of the general public who have no direct affiliation with the practice of marriage and family therapy.

(b) The appointment of any member of the Board shall automatically terminate 30 days after the date the member is no longer a resident of the State of North Carolina.

(c) The Governor shall fill any vacancy by appointment for the unexpired term.

(d) Each member of the Board must be a citizen of this State and must reside in a different congressional district in this State. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 3 provides: "All members of the North Carolina Marital and Family Therapy Certification Board shall continue to be members of the North Carolina Marriage and Family Therapy Licensure Board until the expiration of their terms as members of the North Carolina Marital and Family Therapy Certification Board."

Session Laws 1993 (Reg. Sess., 1994), c. 564, which amended this section, in s. 4 provides: "(a) The North Carolina Marriage and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] shall continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, rewrote subdivision (a)(1); substituted "marriage" for "marital" in subdivision (a)(2); substituted "the member" for "such member" in subsection (b); substituted "The Governor shall fill any vacancy" for "If before the expiration of his term any member shall die, resign, become disqualified, or otherwise cease to be a Board member, the vacancy shall be filled by the" in subsection (c); and added subsection (d).

§ 90-270.51. Powers and duties.

(a) The Board shall administer and enforce this Article.

(b) Subject to the provisions of Chapter 150B of the General Statutes, the Board may adopt, amend, or repeal rules to administer and enforce this Article, including rules of professional ethics for the practice of marriage and family therapy.

(c) The Board shall examine and pass on the qualifications of all applicants for licensure under this Article, and shall issue a license to each successful applicant.

(d) The Board may adopt a seal which may be affixed to all licenses issued by the Board.

(e) The Board may authorize expenditures to carry out the provisions of this Article from the fees that it collects, but expenditures may not exceed the revenues of the Board during any fiscal year.

(f) The Board may employ, subject to the provisions of Chapter 126 of the General Statutes, attorneys, experts, and other employees as necessary to perform its duties. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1987, c. 827, s. 78; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws (Reg. Sess., 1994), c. 554, s. 4 provides: "(a) The North Carolina Marital and Family Therapy Licensure Board shall be considered a continuation of the North Carolina Marital and Family Therapy Certification Board for the purpose of succession to all rights, powers, duties, and obligations of the North Carolina Marital and Family Therapy Certification Board.

"(b) No action or proceeding involving the North Carolina Marital and Family Therapy Certification Board that is pending on the effective date of this act [January 1, 1995] shall be affected by this act. No cause of action arising under this Article before the effective date of this act [January 1, 1995] is affected by this act.

"(c) All rules, regulations, acts, determinations, and decisions of the North Carolina Marital and Family Therapy Certification Board in force on the effective date of this act [January 1, 1995] will continue in force as rules, regulations, acts, determinations, and decisions of the North Carolina Marriage and Family Therapy Licensure Board until modified or repealed by the North Carolina Marriage and Family Therapy Licensure Board."

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Powers and duties" for "Board meetings" in the section catchline; in subsection (a) deleted "the provisions of" preceding "this Article"; substituted the present language of subsection (b) for "The Board may adopt rules to implement this Article"; in subsection (c) substituted "licensure" for "certificates," substituted "license" for "certificate," and deleted "therefor" from the end; in subsection (d) substituted "licenses" for "certificates"; in subsection (e) deleted "deemed necessary" preceding "to carry," substituted "that it" for "which it," deleted "in no event shall" preceding "expenditures," and inserted "may not"; and added subsection (f).

§ 90-270.52. License application.

(a) Each person desiring to obtain a license under this Article shall apply to the Board upon the form and in the manner prescribed by the Board. Each applicant shall furnish evidence satisfactory to the Board that the applicant:

(1) Is of good moral character;

(2) Has not engaged or is not engaged in any practice or conduct that would be a ground for denial, revocation, or suspension of a license under G.S. 90-270.60;

(3) Is qualified for licensure pursuant to the requirements of this Article.

(b) A license obtained through fraud or by any false representation is void. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the section catchline substituted "License" for "Certification";

added the subsection (a) designation; in the introductory language of subsection (a), in the first sentence substituted "license" for "certificate," substituted "apply" for "make application thereof," substituted "the form" for "such form," substituted "prescribed by the Board" for "as the Board shall prescribe and," and in the second sentence added "Each applicant" at the beginning and substituted "the applicant" for "he"; in subdivision (a)(2) substituted "that would" for "which would," added the comma after "revocation," and substituted "license" for "certificate"; in subdivision (a)(3) substitued "licensure" for "certification"; and added subsection (b).

§ 90-270.53: Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 564, s. 2, effective January 1, 1995.

§ 90-270.54. Requirements for license.

(a) Each applicant shall be issued a license by the Board if the applicant meets the qualifications set forth in G.S. 90-270.52(a) and provides satisfactory evidence to the Board that the applicant:

(1) Meets educational and experience qualifications as follows:
   a. Educational requirements: Possesses a minimum of a master's degree from a recognized educational institution in the field of marriage and family therapy, or a degree in an allied mental health field, which degree is evidenced by the applicant's official transcripts which establish that the applicant has completed an appropriate course of study in an allied mental health field. An applicant with a degree in an allied mental health field may meet the educational requirements if the applicant presents satisfactory evidence of post-master's or post-doctoral training taken in the field of marriage and family therapy from a program recognized by the Board regardless whether the training was taken at a nondegree granting institution or in a nondegree program, as long as the training, by itself or in combination with any other training, is the equivalent in content and quality, as defined in the rules of the Board, of a master's or doctoral degree in marriage and family therapy;
   b. Experience requirements: Has at least 1,500 hours of clinical experience in the practice of marriage and family therapy, not more than 500 hours of which were obtained while the candidate was a student in a master's degree program and at least 1,000 of which were obtained after the applicant was granted a degree in the field of marriage and family therapy or an allied mental health field (with ongoing supervision consistent with standards approved by the Board); and

(2) Passes an examination administered by the Board.

(b) Any person who is a certified marriage and family therapist on January 1, 1995, shall be deemed to be a licensed marriage and family therapist as of that date. Valid and unexpired certificates operate as licenses for the purposes of this Article until the date set for renewal of the certificate, at which time the Board shall issue the certificate holder a license in accordance with G.S. 90-270.58. (1979, c. 697, s. 1; 1981, c. 611, s. 2; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Requirements for license" for "Application for certificate by examination" in the section catchline; added the subsection (a) designation; in the introductory language of subsection (a) substituted "Each applicant" for "Any person who applies to the Board after January 1, 1981," substituted "license" for "certificate," substituted "the applicant" for "he" twice, substituted "G.S. 90-270.52(a)" for "subdivisions (1), (2), and (3) of G.S. 90-270.52"; rewrote subdivision (a)(1); in subdivision (a)(2) substituted "an examination" for "a written and/or oral examination"; and added subsection (b).

§ 90-270.55. Examinations.

The Board shall conduct an examination at least once a year at a time and place designated by the Board. Examinations may be written, oral, or both as determined by the Board. Examinations shall include questions in theoretical and applied fields to test an applicant's knowledge and competence to engage in the practice of marriage and family therapy. The Board shall set the passing score for examinations. Any person who fails an examination conducted by the Board shall not be admitted to a subsequent examination for a period of at least six months. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "Examinations" for "Examination" in the section catchline; deleted the former subsection designations; in the second sentence substituted "written, oral, or both" for "written or oral"; in the third sentence deleted "such" preceding "theoretical" and substituted "marriage" for "marital"; and substituted the present fourth sentence for "An applicant shall be held to have passed an examination upon affirmative vote of a majority of the members of the Board present and voting."

§ 90-270.55A. Temporary license.

The Board shall issue a nonrenewable temporary license to a person applying for licensure under G.S. 90-270.54 for a period not to exceed the lesser of one year or the date next scheduled for issuance of new licenses pursuant to G.S. 90-270.54 upon a finding that the person substantially meets the education and experience requirements of G.S. 90-270.54(a)(1). No temporary license shall be issued to a person who has failed an examination administered under G.S. 90-270.55. Recipients of temporary licenses have all the rights, duties, and obligations of permanent licensees, except that the Board shall limit by rule the practice of marriage and family therapy by temporary licensees. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5, made this section effective January 1, 1995.

§ 90-270.56. Reciprocal licenses.

The Board shall issue a license by reciprocity to any person who applies for the license as prescribed by the Board and who is licensed or certified as a marriage and family therapist in another state whose requirements for the license or certificate are equivalent to or exceed the requirements of this State. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the section catchline substituted "licenses" for "certificates"; substituted "license" for "certificate," inserted "who applies for the license as prescribed by the Board and who is," substituted "marriage" for "marital," and deleted from the end "provided the applicant submits an application on forms prescribed by the Board and pays the original certification fee prescribed by this Article."

§ 90-270.57. Fees.

In order to fund the Board's activities under this Article, the Board may charge and collect fees not exceeding the following:

(1) Each license examination	$ 50.00
(2) Each license application	150.00
(3) Each renewal of license	100.00
(4) Each reciprocal license application	150.00
(5) Each reinstatement of an expired license	125.00
(6) Each application to return to active status	125.00.

In addition to the examination fee provided in subdivision (1) of this section, the Board may charge and collect from each applicant for license examination the cost of test materials.

The Board is authorized to return all or a portion of fees paid in cases where the applicant is ineligible or in cases of undue hardship. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1989, c. 581, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, rewrote this section.

§ 90-270.58. Renewal of license.

All licenses issued under this Article shall expire automatically on the first day of July of each year. The Board shall renew a license upon (i) completion of the continuing education requirements of G.S. 90-270.58B and (ii) payment of the renewal fee. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1989, c. 581, s. 2; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, substituted "license" for "certificate" in the section catchline, and rewrote the section.

§ 90-270.58A. Reinstatement after expiration.

A person whose license has expired may have the license reinstated as prescribed by the Board. The Board shall charge and collect a fee for reinstatement of the license. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5 made this section effective January 1, 1995.

§ 90-270.58B. Inactive status.

(a) A person who holds a valid and unexpired license and who is not actively engaged in the practice of marriage and family therapy may apply to the Board to be placed on inactive status. A person on inactive status shall not be required to pay annual renewal fees.

(b) A person on inactive status shall not practice or hold himself out as practicing marriage and family therapy or perform any other activities prohibited by this Article.

(c) A person desiring to return to active status shall submit written application to the Board. The Board shall return the person to active status upon payment of the fee specified in G.S. 90-270.57 and upon such showing of competency to resume practice as the Board may require. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5 made this section effective January 1, 1995.

§ 90-270.58C. Continuing education requirements.

The Board shall prescribe continuing education requirements for licensees. These requirements shall be designed to maintain and improve the quality of professional services in marriage and family therapy provided to the public, to keep the licensee knowledgeable of current research, techniques, and practice, and to provide other resources that will improve skill and competence in marriage and family therapy. The number of hours of continuing education shall not exceed the number of hours available that year in Board-approved courses within the State. The Board may waive these continuing education requirements for not more than 12 months, but only upon the licensee's satisfactory showing to the Board of undue hardship. (1993 (Reg. Sess., 1994), c. 564, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 564, s. 5 made this section effective January 1, 1995.

§ 90-270.59. Disposition of funds.

All moneys received by the Board shall be used to implement this Article. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, deleted "fees and other" preceding "moneys," deleted "collected and" preceding "received," and substituted "to implement" for "for the purpose of implementing."

§ 90-270.60. Denial, revocation, or suspension of license.

(a) Grounds for Denial, Revocation, or Suspension. — The Board may deny, revoke, or suspend a license granted pursuant to this Article on any of the following grounds:

(1) Conviction of a felony under the laws of the United States or of any state of the United States.
(2) Conviction of any crime, an essential element of which is dishonesty, deceit, or fraud.
(3) Fraud or deceit in obtaining a license as a marriage and family therapist.
(4) Dishonesty, fraud or gross negligence in the practice of marriage and family therapy.
(5) Violation of any rule of professional ethics and professional conduct adopted by the Board.

(b) Any disciplinary action taken shall be in accordance with Chapter 150B of the General Statutes. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1987, c. 827, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, in the section catchline added the comma after "revocation" and substituted "license" for "certification"; in the introductory language of subsection (a) substituted "may deny, revoke" for "is authorized to deny, revoke," substituted "license" for "certificate," and inserted "any of"; in subdivision (a)(3) substituted "license as a marriage" for "certificate as a certified marital"; in subdivision (a)(4) substituted "marriage" for "marital"; in subsection (b) deleted "the provisions of" preceding "Chapter"; and made stylistic changes.

§ 90-270.61. Penalties.

Any person not licensed as a marriage and family therapist under this Article who engages in the practice of marriage and family therapy, or holds himself or herself out to be a marriage or family therapist or engaged in marriage and family therapy in violation of this Article is guilty of a Class 2 misdemeanor. (1979, c. 697, s. 1; 1985, c. 223, ss. 1, 1.1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, rewrote this section.

§ 90-270.62. Injunction.

As an additional remedy, the Board may proceed in a superior court to enjoin and restrain any person without a valid license from violating the prohibitions of this Article. The Board shall not be required to post bond to such proceeding. (1979, c. 697, s. 1; 1985, c. 223, s. 1; 1993 (Reg. Sess., 1994), c. 564, s. 2.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective January 1, 1995, deleted "uncertified" preceding "person," and inserted "without a valid license."

ARTICLE 18D.

Occupational Therapy.

§ 90-270.79. Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 648, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 20.

Nursing Home Administrator Act.

§ 90-277. Composition of Board.

There is created the State Board of Examiners for Nursing Home Administrators. The Board shall consist of seven members. The seven members shall be voting members and shall meet the following criteria:

(1) All shall be individuals representative of the professions and institutions concerned with the care and treatment of chronically ill or infirm elderly patients.

(2) Less than a majority of the Board members shall be representative of a single profession or institutional category.

(3) Three of the Board members shall be licensed nursing home administrators, at least one of whom shall be employed by a for-profit nursing home and at least one of whom shall be employed by a nonprofit nursing home. These three Board members shall be considered as representatives of institutions in construing this section.

(4) Four of the Board members shall be public, noninstitutional members, with no direct financial interest in nursing homes.

(5) The terms of the Board members shall be limited to two consecutive terms.

Effective July 1, 1973, the Governor shall appoint three members, one of whom shall be a licensed nursing home administrator, for terms of three years, and four members, two of whom shall be licensed nursing home administrators, for terms of two years. Thereafter, all terms shall be three years. However, no member shall serve more than two consecutive full terms. Any vacancy occurring in the position of an appointive member shall be filled by the Governor for the unexpired term in the same manner as for new appointments. Appointive members may be removed by the Governor for cause after due notice and hearing.

Any member of the Board shall be automatically removed from the Board upon certification by the Board to the Governor that the member no longer satisfies the criteria set forth in subdivisions (1) through (4) of this section for appointment to the Board. (1969, c. 843, s. 1; 1973, c. 728; 1981, c. 722, s. 4; 1995, c. 86, s. 1.)

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, and applicable to all appointments made on or after that date, substituted "at least one of whom shall be employed by a for-profit nursing home and at least one of whom shall be employed by a nonprofit nursing home. These three Board members" for "and" in subdivision (3); and added the last sentence in the section.

§ 90-280. Fees; display of license; duplicate license; inactive list.

(a) Each applicant for an examination administered by the Board and each applicant for an administrator-in-training program shall pay a fee set by the Board not to exceed two hundred dollars ($200.00).

(b) Each person licensed as a nursing home administrator shall be required to pay a license fee in an amount set by the Board not to exceed five hundred dollars ($500.00). A license shall expire on the thirtieth day of September of the second year following its issuance and shall be renewable biennially upon payment of a renewal fee set by the Board not to exceed five hundred dollars ($500.00).

(c) Each person licensed as a nursing home administrator shall display his license certificate, along with the current certificate of renewal, in a conspicuous place in his place of employment.

(d) Any person licensed as a nursing home administrator may receive a duplicate license by payment of a fee set by the Board not to exceed twenty-five dollars ($25.00).

(e) Any person licensed as a nursing home administrator who is not acting, serving, or holding himself out to be a nursing home administrator may have his name placed on an inactive list for such period of time not to exceed five years upon payment of a fee set by the Board not to exceed twenty-five dollars ($25.00).

(f) Any person having a temporary license issued pursuant to G.S. 90-278(3) shall pay a fee in an amount set by the Board not to exceed one hundred dollars ($100.00). If the Board renews the temporary license, no further fee shall be required.

(g) The Board may set fees not to exceed two hundred and fifty dollars ($250.00) for conducting and administering initial training and continuing education courses, and may set a fee not to exceed one hundred dollars ($100.00) for certifying a course submitted for review by another individual or agency wishing to offer such courses. (1969, c. 843, s. 1; 1977, c. 652; 1979, 2nd Sess., c. 1282; 1981 (Reg. Sess., 1982), c. 1234, s. 4; 1983, c. 215; 1995 (Reg. Sess., 1996), c. 645, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "five hundred dollars ($500.00)" for "two hundred fifty dollars ($250.00)" twice in subsection (b); and substituted "one hundred dollars ($100.00)" for "twenty-five dollars ($25.00)" in subsection (g).

§ 90-288. Misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 649, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 22.

Licensure Act for Speech and Language Pathologists and Audiologists.

§ 90-292. Declaration of policy.

CASE NOTES

State Board of Education does not have the power to credential speech pathologists pursuant to their regulatory authority over the qualifications of school employees; the Licensure Act for Speech and Language Pathologists and Audiologists alone governs the qualification of persons practicing speech pathology, no matter what the setting. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996).

§ 90-293. Definitions.

CASE NOTES

Quoted in North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996).

§ 90-294. License required; Article not applicable to certain activities.

(a) Licensure shall be granted in either speech and language pathology or audiology independently. A person may be licensed in both areas if qualified in both areas.

(b) No person may practice or hold himself or herself out as being able to practice speech and language pathology or audiology in this State unless the person holds a current, unsuspended, unrevoked license issued by the Board or is registered with the Board as an assistant. The license required by this section shall be kept conspicuously posted in the person's office or place of business at all times. Nothing in this Article, however, shall be construed to prevent a qualified person licensed in this State under any other law from engaging in the profession or occupation for which such person is licensed.

(c) The provisions of this Article do not apply to:

(1) The activities, services and use of an official title by a person employed by an agency of the federal government and solely in connection with such employment.

(2) The activities and services of a student or trainee in speech and language pathology or audiology pursuing a course of study in an accredited college or university, or working in a training center program approved by the Board, if these activities and services constitute a part of such person's course of study.

(3) Repealed by Session Laws 1987, c. 665, s. 2.

(4) A person who holds a valid and current credential as a speech and language pathologist or audiologist issued by the North Carolina Department of Public Instruction or

who is employed by the North Carolina Schools for the Deaf and Blind, if such person practices speech and language pathology or audiology in a salaried position solely within the confines or under the jurisdiction of the Department of Public Instruction or the Department of Human Resources respectively.

(5) A physician licensed to practice medicine.

(6) Persons performing audiometric screenings and whose work is under the supervision of a licensed physician, or licensed audiologist.

(7) Persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques, or problems of learning to speak again.

(8) Individuals licensed under Chapter 93D of the General Statutes.

(d) Nothing in this Article shall apply to a physician licensed to practice medicine, or to any person employed by such a physician in the course of his practice of medicine.

(e) This Article shall not be construed to prevent any person licensed in this State under Chapter 93D of the General Statutes of North Carolina from the practice of fitting and selling hearing aids.

(f) The provisions of this Article do not apply to registered nurses and licensed practical nurses or other certified technicians trained to perform audiometric screening tests and whose work is under the supervision of a physician, consulting physician, or licensed audiologist.

(g) The provisions of this Article do not apply to persons who are now or may become engaged in counseling or instructing laryngectomees in the methods, techniques or problems of learning to speak again.

(h) No license under this Article is required for persons originally employed by any agency of State government between October 1, 1975, and July 1, 1977, for the practice of speech and language pathology or audiology within and during the course and scope of employment with such agency. (1975, c. 773, s. 1; 1977, c. 692, s. 3; 1981, c. 572, ss. 1, 2; 1987, c. 665, s. 2; 1989, c. 770, s. 17; 1993 (Reg. Sess., 1994), c. 688, s. 1.)

Effect of Amendments. — The 1993 (Reg. Sess., 1994) amendment, effective July 1, 1995, in subsection (b) inserted "or herself," substituted "the" for "such" preceding "person" and "person's," and substituted "or is registered with the Board as an assistant" for "as provided in this Article."

CASE NOTES

Valid and Current Credential. — For purposes of subdivision (c)(4), a valid and current credential will be one which denotes that a person is competent to practice speech pathology, who nevertheless falls short of the requirements for permanent licensure. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996).

State Board of Education does not have the power to credential speech pathologists pursuant to their regulatory authority over the qualifications of school employees, the Licensure Act for Speech and Language Pathologists and Audiologists alone governs the qualification of persons practicing speech pathology, no matter what the setting. North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996).

§ 90-295. Qualifications of applicants for permanent licensure.

CASE NOTES

Applied in North Carolina Bd. of Exmrs. for Speech & Language Pathologists & Audiologists v. North Carolina State Bd. of Educ., 122 N.C. App. 15, 468 S.E.2d 826 (1996).

§ 90-298.1. Registered assistant.

A licensed speech and language pathologist or a licensed audiologist may register with the Board an assistant who works under the licensee's supervision if all of the following requirements are met:

(1) The assistant meets the qualifications for registered assistants adopted by the Board.

(2) The licensee who supervises the assistant pays the registration fee set by the Board.

A registration of an assistant must be renewed annually. To renew the registration of an assistant, the licensee who supervises the assistant must submit an application for renewal and pay the renewal fee. An initial or renewal fee for registering an assistant may not exceed the renewal license fee set under G.S. 90-305. (1993 (Reg. Sess., 1994), c. 688, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 688, s. 3, made this section effective July 1, 1995.

§ 90-306. Penalty for violation.

Editor's Note. — Session Laws 1993, c. 539, s. 650, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 23.

Right to Natural Death; Brain Death.

§ 90-321. Right to a natural death.

OPINIONS OF ATTORNEY GENERAL

The North Carolina legislature did not "create" the right to a natural death, but instead, "recognized" that right. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

Nonexclusive Procedure. — The Right to Natural Death Act was not intended to create an exclusive procedure for accomplishing a natural death, thereby rendering all other procedures unlawful. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

The procedure established under § 90-322 by which a physician may withhold or discontinue extraordinary or artifical nutrition or hydration in the absence of a declaration for a natural death executed pursuant to this section, is nonexclusive. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

It is not unlawful for a physician to deviate from the procedures set out in this Act, but the physician who does so will lose the benefit of the absolute defense. As a result, the standard of care by which the physician's acts or omissions will be judged will be the general standard of care for physicians which is set out in statutory and common law. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

§ 90-322. Procedures for natural death in the absence of a declaration.

OPINIONS OF ATTORNEY GENERAL

Nonexclusive Procedure. — The Right to Natural Death Act was not intended to create an exclusive procedure for accomplishing a natural death, thereby rendering all other procedures unlawful. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

The procedure established under this section by which a physician may withhold or discontinue extraordinary means or artifical nutrition or hydration in the absence of a declaration for a natural death executed pursuant to § 90-321, is nonexclusive. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 5, 1995).

It is not unlawful for a physician to deviate from the procedures set out in this Act, but the physician who does so will lose the benefit of the absolute defense. As a result, the standard of care by which the physician's acts or omissions will be judged will be the general standard of care for physicians which is set out in statutory and common law. See Opinion of Attorney General to C. Robin Britt, Sr., Secretary, Department of Human Resources, — N.C.A.G. — (January 10, 1995).

ARTICLE 24.

Licensed Professional Counselors Act.

§ 90-330. Definitions; practice of marriage and family therapy.

(a) Definitions. — As used in this Article certain terms are defined as follows:

- (1) Repealed by Session Laws 1993, c. 514, s. 1, effective July 1, 1994.
- (1a) The "Board" means the Board of Licensed Professional Counselors.
- (2) A "licensed professional counselor" is a person engaged in the practice of counseling who holds a license as a licensed professional counselor issued under the provisions of this Article.
- (3) The "practice of counseling" means holding oneself out to the public as a professional counselor offering counseling services that include, but are not limited to, the following:
  - a. Counseling. — Assisting individuals, groups, and families through the counseling relationship by treating mental disorders and other conditions through the use of a combination of clinical mental health and human

development principles, methods, diagnostic procedures, treatment plans, and other psychotherapeutic techniques, to develop an understanding of personal problems, to define goals, and to plan action reflecting the client's interests, abilities, aptitudes, and mental health needs as these are related to personal-social-emotional concerns, educational progress, and occupations and careers.

b. Appraisal Activities. — Administering and interpreting tests for assessment of personal characteristics.

c. Consulting. — Interpreting scientific data and providing guidance and personnel services to individuals, groups, or organizations.

d. Referral Activities. — Identifying problems requiring referral to other specialists.

e. Research Activities. — Designing, conducting, and interpreting research with human subjects.

(4) A "supervisor" means any licensed professional counselor or, when one is inaccessible, an equivalently credentialed mental health professional, as determined by the Board, with a minimum of five years of counseling experience who meets the qualifications established by the Board.

(b) Repealed by Session Laws 1993, c. 514, s. 1, effective July 1, 1994.

(c) Practice of Marriage and Family Therapy, Psychology, or Social Work. — No person licensed as a licensed professional counselor under the provisions of this Article shall be allowed to hold himself or herself out to the public as a certified marriage and family therapist, licensed practicing psychologist, psychological associate, or certified clinical social worker unless specifically authorized by other provisions of law. (1983, c. 755, s. 1; 1993, c. 514, s. 1; 1995, c. 157, s. 4.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to claims for payment or reimbursement for services rendered on or after that date, substituted "relationship by treating mental disorders and other conditions through the use of" for "relationship, using" following "through the counseling" in subdivision (a)(3)a.

§ 90-332.1. Exemptions from licensure.

(a) It is not the intent of this Article to regulate members of other regulated professions who do counseling in the normal course of the practice of their profession. Accordingly, this Article does not apply to:

(1) Lawyers licensed under Chapter 84, doctors licensed under Chapter 90, and any other person registered, certified, or licensed by the State to practice any other occupation or profession while rendering counseling services in the performance of the occupation or profession for which the person is registered, certified, or licensed.

(2) Any school counselor certified by the State Board of Education while counseling within the scope of employment by a board of education or private school.

(3) Any student intern or trainee in counseling pursuing a course of study in counseling in a regionally accredited institution of higher learning or training institution, if the

intern or trainee is a designated "counselor intern" and the activities and services constitute a part of the supervised course of study.

(4) Any person counseling as a supervised counselor in a supervised professional practice under G.S. 90-336(b)(2).

(4.1) Any person counseling within the scope of employment at a local community college.

(4.2) Any person counseling within the scope of employment at a private higher education institution as defined in G.S. 116-22(1).

(5) Any ordained minister or other member of the clergy while acting in a ministerial capacity who does not charge a fee for the service, or any person invited by a religious organization to conduct, lead, or provide counseling to its members when the service is not performed for more than 30 days a year.

(6) Any nonresident temporarily employed in this State to render counseling services for not more than 30 days in a year, if the person holds a license or certificate required for counselors in another state.

(7) Any person employed by State, federal, county, or municipal government while counseling within the scope of employment.

(8) Any person performing counseling solely as an employee of an area facility, as defined in G.S. 122C-3(14)a., if both of the following apply:

   a. The services are provided by (i) a qualified professional as defined in G.S. 122C-3(31) and subject to the rules adopted by the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, or (ii) an employee supervised by a qualified professional as defined in G.S. 122C-3(31);

   b. The area facility has obtained written verification from the following boards that the employee has not had his or her license, registration, or certification revoked, rescinded, or suspended: the North Carolina Board of Licensed Professional Counselors, the North Carolina State Board of Examiners of Practicing Psychologists, the North Carolina Certification Board for Social Work, and the North Carolina Marital and Family Therapy Certification Board;

(9) Any person performing counseling as an employee of a hospital or other health care facility licensed under Chapter 131D, 131E, or 122C who is performing this counseling under the supervision of a qualified professional as defined in G.S. 122C-3(31); and

(10) Any employee assistance professional providing core-specific employee assistance program (EAP) activities, as defined by the Employee Assistance Professionals Association Standards for Employee Assistance Programs Part II: Professional Guidelines (1988).

(b) Persons who claim to be exempt under subsection (a) of this section are prohibited from advertising or offering themselves as "licensed professional counselors".

(c) Persons licensed under this Article are exempt from rules pertaining to counseling adopted by other occupational licensing boards.

(d) Nothing in this Article shall prevent a person from performing substance abuse counseling or substance abuse prevention consulting as defined in Article 5C of this Chapter. (1993, c. 514, s. 1; 1993 (Reg. Sess., 1994), c. 591, ss. 12, 16(a), 16(b); c. 685, s. 2.)

Editor's Note. —

The North Carolina Marital and Family Therapy Certification Board, referred to above, is now the North Carolina Marriage and Family Therapy Licensure Board. See §§ 90-270.45 et seq.

Session Laws 1993 (Reg. Sess., 1994), c. 685, s. 2, which amended this section, was effective July 1, 1994, and applicable to requirements imposed on or after that date, and to causes of action, whether civil, criminal, or administrative, arising on or after that date.

§ 90-338. Exemptions.

Applicants holding certificates of registration as Registered Practicing Counselors and in good standing with the Board shall be issued licenses as licensed professional counselors without meeting the requirements of G.S. 90-336(b). The following applicants shall be exempt from the academic qualifications required by this Article for licensed professional counselors and shall be licensed upon passing the Board examination and meeting the experience requirements:

(1) An applicant who was engaged in the practice of counseling before July 1, 1993, and who applies to the Board prior to January 1, 1996.

(2) An applicant who holds a masters degree from a college or university accredited by one of the regional accrediting associations or from a college or university determined by the Board to have standards substantially equivalent to a regionally accredited institution, provided the applicant was enrolled in the masters program prior to July 1, 1994. (1983, c. 755, s. 1; 1993, c. 514, s. 1; 1993 (Reg. Sess., 1994), c. 685, s. 3; c. 769, s. 25.19; 1995, c. 157, s. 3.)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, and applicable to claims for payment or reimbursement for services rendered on or after that date, added "and who applies to the Board prior to January 1, 1996" to the end of subdivision (1).

§ 90-341. Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 651, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 25.

Dietetics/Nutrition.

§ 90-354. Appointments and removal of Board members, terms and compensation.

(a) The members of the Board shall be appointed as follows:

(1) The Governor shall appoint the professional member described in G.S. 90-353(a)(5) and the two public members described in G.S. 90-353(a)(6);

(2) The General Assembly upon the recommendation of the Speaker of the House of Representatives shall appoint the professional members described in G.S. 90-353(a)(1) and G.S. 90-353(a)(2) in accordance with G.S. 120-121, one of whom shall be a nutritionist with a masters or higher degree in a nutrition-related discipline; and

(3) The General Assembly upon the recommendation of the President Pro Tempore of the Senate shall appoint the professional members described in G.S. 90-353(a)(3) and G.S. 90-353(a)(4) in accordance with G.S. 120-121, one of whom shall be a nutritionist with a masters or higher degree in a nutrition-related discipline.

(b) Of the members initially appointed, the professional member appointed by the Governor, one of the professional members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and one of the professional members appointed by the General Assembly upon the recommendation of the President of the Senate shall be appointed for three-year terms; one of the public members appointed by the Governor, one of the professional members appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives, and one of the professional members appointed by the General Assembly upon the recommendation of the President of the Senate shall be appointed for two-year terms; and one of the public members appointed by the Governor shall be appointed for a one-year term. After the initial terms specified in this subsection, members of the Board shall take office on the first day of July immediately following the expired term of that office and shall serve for a term of three years and until their successors are appointed and qualified.

(c) No member shall serve on the Board for more than two consecutive terms.

(d) The Governor may remove members of the Board, after notice and opportunity for hearing, for:

(1) Incompetence;

(2) Neglect of duty;

(3) Unprofessional conduct;

(4) Conviction of any felony;

(5) Failure to meet the qualifications of this Article; or

(6) Committing any act prohibited by this Article.

(e) Any vacancy shall be filled by the appointing authority originally filling that position, except that any vacancy in appointments by the General Assembly shall be filled in accordance with G.S. 120-122.

(f) Members of the Board shall receive no compensation for their services, but shall be entitled to travel, per diem, and other expenses authorized by G.S. 93B-5. (1991, c. 668, s. 1; 1995, c. 490, s. 16.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment added "Pro Tempore" in subdivision (a)(3). For the applicability of this amendment, see Editor's note.

§ 90-366. Violation a misdemeanor.

Editor's Note. — Session Laws 1993, c. 539, s. 652, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 90-368. Persons and practices not affected.

The requirements of this Article shall not apply to:

(1) A health care professional duly licensed in accordance with Chapter 90 of the General Statutes.

(2) A student or trainee, working under the direct supervision of a licensed dietitian/nutritionist while fulfilling an experience requirement or pursuing a course of study to meet requirements for licensure, for a limited period of time as determined by the Board.

(3) A dietitian/nutritionist serving in the Armed Forces or the Public Health Service of the United States or employed by the Veterans Administration when performing duties associated with that service or employment.

(4) A person aiding the practice of dietetics/nutrition if the person works under the direct supervision of a licensed dietitian/nutritionist and performs only support activities that do not require formal academic training in the basic food, nutrition, chemical, biological, behavioral, and social sciences that are used in the practice of dietetics.

(5) An employee of the State, a local political subdivision, or a local school administrative unit or a person that contracts with the State, a local political subdivision, or a local school administrative unit while engaged in the practice of dietetics/nutrition within the scope of that employment.

(6) A retailer who does not hold himself out to be a dietitian or nutritionist when that retailer furnishes nutrition information to customers on food, food materials, dietary supplements and other goods sold at his retail establishment in connection with the marketing and distribution of those goods at his retail establishment.

(7) A person who provides weight control services; provided the program has been reviewed by, consultation is available from, and no program change can be initiated without prior approval of:

a. A licensed dietitian/nutritionist;

   b. A dietitian/nutritionist licensed in another state that has licensure requirements that are at least as stringent as under this Article; or
   c. A dietitian registered by the Commission on Dietetic Registration of the American Dietetic Association.
(8) Employees or independent contractors of a hospital or health care facility licensed under Article 5 or Part A of Article 6 of Chapter 131E or Article 2 of Chapter 122C of the General Statutes.
(9) A person who does not hold himself out to be a dietitian or nutritionist when that person furnishes nutrition information on food, food materials, or dietary supplements. This Article does not prohibit that person from making explanations to customers about foods or food products in connection with the marketing and distribution of these products.
(10) An herbalist or other person who does not hold himself out to be a dietitian or nutritionist when the person furnishes nonfraudulent specific nutritional information and counseling about the reported or historical use of herbs, vitamins, minerals, amino acids, carbohydrates, sugars, enzymes, food concentrates, or other foods. (1991, c. 668, s. 1; 1995, c. 509, s. 135.2(s).)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, inserted "or" preceding "health care" in subdivision (8).

ARTICLE 26.

Fee-Based Practicing Pastoral Counselors.

§ 90-390. Refusal, suspension, or revocation of a certificate.

(a) A certificate applied for or issued under this Article may be refused, suspended, revoked, or otherwise limited as provided in subsection (e) of this section by the Board upon proof that the applicant or person to whom a certificate was issued:
(1) Has been convicted of a felony;
(2) Has been convicted of a misdemeanor involving moral turpitude, misrepresentation or fraud in dealing with the public, or an offense relevant to fitness to practice certified fee-based pastoral counseling;
(3) Has engaged in fraud or deceit in securing or attempting to secure a certificate or the renewal of a certificate or has willfully concealed from the Board material information in connection with application for or renewal of a certificate under this Article;
(4) Is a habitual drunkard or is addicted to deleterious habit-forming drugs;
(5) Has made fraudulent or misleading statements pertaining to his education, licensure, professional credentials, or related to his qualification or fitness for the practice of pastoral counseling;
(6) Has had a license for the practice of pastoral counseling in any other state or any other country suspended or revoked;

(7) Has been guilty of unprofessional conduct as defined by the relevant code of ethics published by the American Association of Pastoral Counselors; or

(8) Has violated any provision of this Article or the rules of the Board.

(b) A certificate issued under this Article shall be automatically suspended by the Board after failure to renew a certificate for a period of more than three months after the annual renewal date.

(c) Except as otherwise provided in this Article, the procedure for revocation, suspension, refusal, or other limitations of the certificate shall be in accordance with the provisions of Chapter 150B of the General Statutes. In any proceeding or record of any hearing before the Board, and in any complaint or notice of charges against any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate and in any decision rendered by the Board, the Board shall endeavor to withhold from public disclosure the identity of any counselees or clients who have not consented to the public disclosure of treatment by the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate. The Board may close a hearing to the public and receive in a closed session evidence concerning the treatment or delivery of pastoral counseling services to a counselee or a client who has not consented to public disclosure of treatment or services, as may be necessary for the protection of the counselee's or client's rights and the full presentation of relevant evidence. All records, papers, and documents containing information collected and compiled by or on behalf of the Board as a result of investigations, inquiries, or interviews conducted in connection with certification or disciplinary matters are not public records within the meaning of Chapter 132 of the General Statutes. However, any notice or statement of charges against any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate, any notice to any certified fee-based pastoral counselor or certified fee-based pastoral counseling associate of a hearing in any proceeding, or any decision rendered in connection with a hearing in any proceeding is a public record within the meaning of Chapter 132 of the General Statutes, except that identifying information concerning the treatment or delivery of services to a counselee or client who has not consented to the public disclosure of such treatment or services may be deleted. Any record, paper, or other document containing information collected and compiled by or on behalf of the Board, as provided in this section, that is received and admitted in evidence in any hearing before the Board shall be a public record within the meaning of Chapter 132 of the General Statutes, subject to any deletions of identifying information concerning the treatment or delivery of pastoral counseling services to a counselee or client who has not consented to public disclosure of the treatment or services.

(d) The Board may reinstate a suspended certificate upon payment by an applicant of a fee of twenty dollars ($20.00), and may require that the applicant file a new application, submit to reexamination for reinstatement, and pay other authorized fees as required by the Board.

(e) Upon proof that a certified fee-based pastoral counselor or certified fee-based pastoral counseling associate certified under this Article has engaged in any of the prohibited actions specified in subsection (a) of this section, the Board may, in lieu of refusal, suspension, or revocation, do any one or more of the following:

(1) Issue a formal reprimand;

(2) Formally censure the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate;

(3) Place the certified fee-based pastoral counselor or certified fee-based pastoral counseling associate on probation with any conditions the Board may deem advisable; or

(4) Limit or circumscribe the professional pastoral counseling services provided by the certified fee-based pastoral counselor or the certified fee-based pastoral counseling associate as the Board deems advisable.

(f) The Board may impose conditions of probation or restrictions on continued practice at the conclusion of a period of suspension or as a condition for the restoration of a revoked or suspended certificate. In lieu of or in connection with any disciplinary proceedings or investigation, the Board may enter into a consent order relating to the discipline, censure, proceeding costs, probation, or limitations on the practice of a certified fee-based pastoral counselor or certified fee-based pastoral counseling associate. (1991, c. 670, s. 1; 1993 (Reg. Sess., 1994), c. 570, s. 8.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 570, s. 12 provides that the amendment to this section by c. 570, s. 8 shall not affect pending litigation.

ARTICLE 27.

Referral Fees and Payment for Certain Solicitations Prohibited.

§ 90-400. Definition.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 1, effective October 1, 1994, substituted "Referral Fees and Payment of Certain Solicitations Prohibited" for "Runners Prohibited" as the title of this Article.

§ 90-401. Referral fees and payment for certain solicitations prohibited.

A health care provider shall not financially compensate in any manner a person, firm, or corporation for recommending or securing the health care provider's employment by a patient, or as a reward for having made a recommendation resulting in the health care provider's employment by a patient. No health care provider who refers a patient of that health care provider to another health care provider shall receive financial or other compensation from the health care provider receiving the referral as a payment solely or primarily for the referral. This section shall not be construed to prohibit a health care provider's purchase of advertising which does not entail direct personal contact or telephone contact of a potential patient. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

§ 90-401.1. Direct solicitation prohibited.

It shall be unlawful for a health care provider or the provider's employee or agent to initiate direct personal contact or telephone contact with any injured, diseased, or infirmed person, or with any other person residing in the injured, diseased, or infirmed person's household, for a period of 90 days following the injury or the onset of the disease or infirmity, if the purpose of initiating the contact, in whole or in part, is to attempt to induce or persuade the injured, diseased, or infirmed person to become a patient of the health care provider. This section shall not be construed to prohibit a health care provider's use of posted letters, brochures, or information packages to solicit injured, diseased, or infirmed persons, so long as such use does not entail direct personal contact with the person. (1993 (Reg. Sess., 1994), c. 689, s. 3.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 6, made this section effective October 1, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

§ 90-402. Sanctions.

Violation of the provisions of this Article shall be grounds for the offending health care provider's licensing board to suspend or revoke the health care provider's license, to refuse to renew the health care provider's license, or to take any other disciplinary action authorized by law. (1991 (Reg. Sess., 1992), c. 858, s. 1; 1993 (Reg. Sess., 1994), c. 689, s. 4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 689, s. 5, is a severability clause.

ARTICLE 28.

Self-Referrals by Health Care Providers.

§ 90-405. Definitions.

As used in this Article, the term

(1) "Board" means any of the following boards created in Chapter 90 of this Article relating respectively to the professions of medicine, dentistry, optometry, osteopathy, chiropractic, nursing, podiatry, psychology, physical therapy, occupational therapy, speech and language pathology and audiology.

(2) "Department" means the Department of Human Resources of the State of North Carolina.

(3) "Designated health care services" means, and includes for purposes of this section, any health care procedure and service provided by a health care provider that is covered by or insured under any health benefit plan regulated by

Chapter 58 of the General Statutes, any employee welfare benefit plan regulated by the Employee Retirement Income Security Act of 1974, any federal or State employee insurance program, Medicare or Medicaid.

(4) "Entity" means any individual, partnership, firm, corporation, or other business that provides health care services.

(5) "Fair market value" means the value of the rental property for commercial purposes not adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property as a result of its proximity or convenience to sources of referrals or business.

(6) "Group practice" means a group of two or more health care providers legally organized as a partnership, professional corporation, or similar association:

a. In which each health care provider who is a member of the group provides services including consultation, diagnosis, or treatment, through the joint use of shared facilities, equipment, and personnel;

b. For which substantially all the services of the health care providers who are members of the group are provided through the group and are billed in the name of the group and amounts so received are treated as receipts of the group; and

c. In which the overhead expenses of and the income from the practice are distributed in accordance with methods previously determined by members of the group.

(7) "Health care provider" is any person who, pursuant to Chapter 90 of the General Statutes, is licensed, or is otherwise registered or certified to engage in the practice of any of the following: medicine, dentistry, optometry, osteopathy, chiropractic, nursing, podiatry, psychology, physical therapy, occupational therapy or speech and language pathology and audiology.

(8) "Immediate family member" means a health care provider's spouse or dependent minor child.

(9) "Investment interest" means an equity or debt security issued by an entity, or a lease or retained interest in real property held by an entity, including, without limitation, shares of stock in a corporation, units or other interests in a partnership, bonds, debentures, notes, leases, options or contracts related to real property or other equity interests or debt instruments. "Investment interest" and legal or beneficial interest shall not include any interest in:

a. Bonds or other debt instruments issued pursuant to the provisions of Chapter 159 of the General Statutes;

b. A written lease of real property entered into on or before January 1, 1990, for a term of five years or more or a written lease of real property for a term of one year or more, which fully describes the leased premises, the terms and conditions for the lease thereof, with the aggregate rental charge, set in advance, consistent with fair market value in arms- length transactions and not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties to the lease;

c. An employee's stock purchase, savings, pension, profit sharing or other similar benefit plan in which the investor does not direct investments;

d. Investment interests (including shares of stock, bonds, debentures, notes or other debt instruments) in any corporation that is listed for trading on the New York Stock Exchange, the American Stock Exchange, or is a national market system security traded under automated interdealer quotation system operated by the National Association of Securities Dealers and has, at the end of the corporation's most recent fiscal year, total assets exceeding fifty million dollars ($50,000,000), provided that one of the following requirements is satisfied:

  1. The investment interests are purchased in a nonissuer transaction as permitted by G.S. 78A-17(3); or
  2. The investment interests are issued in a transaction terminating a health care provider's legal, beneficial, or investment interest in a privately held entity which such health care provider acquired before April 1, 1993, provided that such transaction is completed before July 1, 1995, and the health care provider liquidates the investment interests by July 1, 1997.

(10) "Investor" means an individual or entity owning a legal or beneficial ownership or investment interest, directly or indirectly (including without limitation, through an immediate family member, trust, affiliate, or another entity related to the investor).

(11) "Referral" means any referral of a patient for designated health care services, including, without limitation:

a. The forwarding of a patient by one health care provider to another health care provider or to an entity that provides any designated health care service; or

b. The request or establishment of a plan of care by a health care provider, which includes the provision of designated health care services.

"Referral" does not mean any designated health care service or any referral to an entity for a designated health care service which is provided by, or provided under the personal supervision of, a sole health care provider or by a member of a group practice to the patients of that health care provider or group practice. (1993, c. 482, s. 1; 1995, c. 509, s. 46.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted the present catchline for the former catchline, which read "Definition".

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

§ 90-406. Self-referrals prohibited.

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

§ 90-407. Disciplinary action and penalties.

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

§ 90-408. Exceptions for underserved areas.

Legal Periodicals. — For comment, "The Physician as Entrepreneur: State and Federal Restrictions on Physician Joint Ventures," see 73 N.C.L. Rev. 293 (1994).

ARTICLE 29.

Medical Records.

§ 90-411. Record copy fee.

A health care provider may charge a reasonable fee to cover the costs incurred in searching, handling, copying, and mailing medical records to the patient or the patient's designated representative. The maximum fee shall be fifty cents (50) per page, provided that the health care provider may impose a minimum fee of up to ten dollars ($10.00), inclusive of copying costs. If requested by the patient or the patient's designated representative, nothing herein shall limit a reasonable professional fee charged by a physician for the review and preparation of a narrative summary of the patient's medical record. This section shall only apply with respect to liability claims for personal injury, except that charges for medical records and reports related to claims under Article 1 of Chapter 97 of the General Statutes shall be governed by the fees established by the North Carolina Industrial Commission pursuant to G.S. 97-26.1. (1993, c. 529, s. 4.3; 1993 (Reg. Sess., 1994), c. 679, s. 5.5; 1995 (Reg. Sess., 1996), c. 742, s. 36.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 5.5, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective September 1, 1994, and applicable to claims pending on or filed after that date.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "97-26.1" for "97-26.4" at the end of the section.

ARTICLE 30.

Practice of Acupuncture.

§ 90-452. Practice of acupuncture without license prohibited.

(a) Unlawful Acts. — It is unlawful to engage in the practice of acupuncture without a license issued pursuant to this Article. It is unlawful to advertise or otherwise represent oneself as qualified or authorized to engage in the practice of acupuncture without having the license required by this Article. A violation of this subsection is a Class 1 misdemeanor.

(b) Exemptions. — This section shall not apply to any of the following persons:

(1) A physician licensed under Article 1 of this Chapter.
(2) A student practicing acupuncture under the direct supervision of a licensed acupuncturist as part of a course of study approved by the Board.
(3) A chiropractor licensed under Article 8 of this Chapter. (1993, c. 303, s. 1; 1994, Ex. Sess., c. 14, s. 48.)

Editor's Note. — Session Laws 1994, Extra Session, c. 14, s. 73 provides: "Prosecutions for offenses committed before the effective date of this act [October 1, 1994] are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1994, Extra Session, c. 14, s. 48, which amended this section, was effective on the same date that Chapter 539 of the 1993 Session Laws became effective (October 1, 1994), and applicable to offenses occurring on or after that date.

§§ 90-460 through 90-469: Reserved for future codification purposes.

ARTICLE 31.

Institute of Medicine.

§ 90-470. Institute of Medicine.

The persons appointed under the provisions of this section are declared to be a body politic and corporate under the name and style of the North Carolina Institute of Medicine, and by that name may sue and be sued, make and use a corporate seal and alter the same at pleasure, contract and be contracted with, and shall have and enjoy all the rights and privileges necessary for the purposes of this section. The corporation shall have perpetual succession.

The purposes for which the corporation is organized are to:

(1) Be concerned with the health of the people of North Carolina;
(2) Monitor and study health matters;
(3) Respond authoritatively when found advisable;
(4) Respond to requests from outside sources for analysis and advice when this will aid in forming a basis for health policy decisions.

The 18 initial members of the North Carolina Institute of Medicine shall be appointed by the Governor.

The initial members are authorized, prior to expanding the membership, to establish bylaws, to procure facilities, employ a director and staff, to solicit, receive and administer funds in the name of the North Carolina Institute of Medicine, and carry out other activities necessary to fulfill the purposes of this section.

The members shall select with the approval of the Governor additional members, so that the total membership will not exceed 100. The membership should be distinguished and influential leaders from the major health professions, the hospital industry, the health insurance industry, State and county government and other political units, education, business and industry, the universities, and the university medical centers.

The North Carolina Institute of Medicine may receive and administer funds from private sources, foundations, State and county governments, federal agencies, and professional organizations.

The director and staff of the North Carolina Institute of Medicine should be chosen from those well established in the field of health promotion and medical care.

For the purposes of Chapter 55A of the General Statutes, the members appointed under this section shall be considered the initial board of directors.

The North Carolina Institute of Medicine is declared to be under the patronage and control of the State.

The General Assembly reserves the right to alter, amend, or repeal this section. (1983, c. 923, s. 197; 1995, c. 297, s. 1.)

Editor's Note. — Session Laws 1995, c. 297, s. 1, provides in part: "Section 197 of Chapter 923 of the Session Laws of 1983 reads as rewritten: 'Sec. 197. Chapter 90 of the General Statutes is amended by adding a new Article to read'". Section 2 of Session Laws 1995, c. 297, makes c. 297 effective upon ratification; the Act was ratified June 20, 1995.

§§ 90-471 through 90-499: Reserved for future codification purposes.

ARTICLE 32.

Employee Assistance Professionals.

§ 90-500. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Board" means the Board of Employee Assistance Professionals.

(2) "Certified employee assistance professional" means an employee assistance professional who is certified by the Employee Assistance Certification Commission and who has the necessary professional qualifications to provide the employee assistance program services listed in subdivision (2) of this section, which services can be worksite based and are designed to assist in the identification and resolution of productivity problems associated with employees impaired by personal concerns.

(3) "Consultation" means the act of giving expert advice on the role of an employee assistance professional in assisting troubled employees.

(4) "Employee Assistance Certification Commission" means the national body with the authority to certify employee assistance professionals based on experience and the passing of a national examination.

(5) "Employee assistance professional" means a person who provides the following services to the public in a program designed to assist in the identification and resolution of job performance problems in the workplace:
  a. Expert consultation and training of appropriate persons in the identification and resolution of job performance issues related to the employees' personal concerns.
  b. The confidential, appropriate, and timely assessment of problems.
  c. Short-term problem resolution for issues that do not require clinical counseling or treatment.
  d. Referrals for appropriate diagnosis, treatment, and assistance to certified or licensed professionals when clinical counseling or treatment is required.
  e. Establishment of linkages between workplace and community resources that provide such services.
  f. Follow-up services for employees and dependents who use such services. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 720, s. 3, made this Article effective January 1, 1997.

This Article was enacted by Session Laws 1995 (Reg. Sess., 1996), c. 720, s. 1 as Article 31. The number of this Article was assigned by the Revisor of Statutes.

§ 90-501. Board of Employee Assistance Professionals; members.

(a) The Board of Employee Assistance Professionals is created.

(b) The Board consists of five members to be appointed by the Governor. Members shall serve for terms of five years. All members must be residents of North Carolina.

(c) The following requirements shall apply to appointments to the Board:

(1) Two members shall be licensed employee assistance professionals who are privately employed.

(2) One member shall not be directly or indirectly engaged in the employee assistance profession.

(3) Two members shall be licensed employee assistance professionals.

(d) The licensed employee assistance professionals appointed pursuant to subdivision (1) or (3) of subsection (c) of this section must have been engaged in the active practice of being an employee assistance professional for no less than five years.

(e) The North Carolina Chapter of the Employee Assistance Professionals Association shall submit a list of at least three nominees for each appointment. The Governor may make appointments from this list.

(f) Any member of the Board shall be removed from the Board upon certification by the Board to the Governor that the member no longer satisfies the employment requirements set forth in subsection (c) of this section for appointment to the Board. The Governor shall appoint a replacement from a list of nominees submitted by the North Carolina Chapter of the Employee Assistance Professionals Association within 60 days of the Governor's receiving the list of nominees.

(g) Members shall serve until their successors are appointed and duly qualified. Any vacancy occurring on the Board shall be filled by the Governor appointing a member for the balance of the unexpired term. A Board member who has served a five-year term shall not be eligible for reappointment during the one-year period following the appointment of that member's successor.

(h) In making appointments to the Board, the Governor shall strive to ensure that at least one member serving on the Board is 60 years of age or older and that at least one member serving on the Board is a member of a racial minority.

(i) For each day engaged in the business of the Board, members shall receive compensation of fifty dollars ($50.00) and shall receive reimbursement for actual expenses.

(j) Annually, the members of the Board shall elect a chair and a secretary.

(k) The Board shall meet as frequently as is reasonably necessary to implement the provisions of this Article. Three or more members of the Board shall constitute a quorum for the purpose of transacting business.

(*l*) For administrative purposes, the Board shall be an independent entity. The Department of Human Resources shall provide staff to the Board to assist the Board in transacting its business. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 720, s. 2, provides: "Notwithstanding the provisions of G.S. 90-501(b) to the contrary, as enacted in Section 1 of this act, the Governor shall make initial appointments to the Board of Employee Assistance Professionals created in G.S. 90-501, as enacted by Section 1 of this act, to serve for terms as follows:

"(1) For the initial appointments made pursuant to G.S. 90-501(c)(1), one shall serve for a one-year term, and the other shall serve for a three-year term.

"(2) The initial appointment made pursuant to G.S. 90-501(c)(2) shall serve for a two-year term.

"(3) For the initial appointments made pursuant to G.S. 90-501(c)(3), one shall serve for a four-term, and the other shall serve for a five-year term.

"The Governor shall make initial appointments to the Board within 90 days of the effective date of this section [January 1, 1997].

"Notwithstanding the provisions of G.S. 90-501, as enacted by Section 1 of this act, each initial Board member, except the member who is not directly or indirectly engaged as an employee assistance professional, shall have five years continuous experience as an employee assistance professional immediately preceding his or her appointment and currently shall be certified by the Employee Assistance Certification Commission."

§ 90-502. Powers and duties of the Board.

The Board shall:

(1) Approve educational programs and establish and prescribe the curricula and minimum standards for training required to prepare persons for licensure and licensure renewal under this Article.

(2) Adopt rules governing the issuance, renewal, suspension, and revocation of licenses.

(3) Establish minimum standards governing the activities and operations of licensed employee assistance professionals.
(4) Issue licenses.
(5) Establish and collect fees.
(6) Assess civil penalties as provided in this Article. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-503. License requirements.

(a) An applicant must satisfy all of the following requirements to be eligible to be licensed under this Article:
(1) Have obtained a masters degree.
(2) Have obtained a degree in any field of human services at either the undergraduate degree level or the masters degree level.
(3) Be certified by the Employee Assistance Certification Commission.
(4) Maintain certification by being recertified by the Employee Assistance Certification Commission every three years by either passing an examination or by completing continuing education in accordance with rules adopted by the Board.

(b) Notwithstanding the requirements of subsection (a) of this section, a person who has received a certification as an employee assistance professional from the Employee Assistance Certification Commission may apply until January 1, 2000, to the Board for licensure and shall receive a license as an employee assistance professional upon proof of such certification and upon payment of a fee in an amount established by the Board.

(c) Licenses must be obtained by each individual employee assistance professional. A company or organization shall not be issued a license.

(d) Any person desiring to be licensed under this Article as an employee assistance professional shall apply to the Board on a form approved by the Board. The applicant shall submit with the application form a fee in an amount established by the Board. The applicant shall complete the application, submitting all information the Board deems necessary to evaluate the applicant.

(e) Each license shall be valid for a period of up to three years. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-504. License renewals.

(a) Renewal of any license issued under the provisions of this Article may be accomplished by paying a fee in an amount established by the Board, submitting a renewal application, and otherwise complying with rules adopted by the Board.

(b) Any person licensed as an employee assistance professional shall renew his or her license according to rules adopted by the Board.

(c) If any licensee fails to renew his or her license within 60 days after the date the application becomes due, the license of that person shall be revoked automatically without further notice or hearing, unless the licensee specifically requests an extension. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-505. Requirements for persons licensed out-of-state.

An applicant who is currently certified by the Employee Assistance Certification Commission or licensed in another state and who:

(1) Is in good standing in another state;
(2) Meets the licensure requirements approved by the Board;
(3) Resides in this State, or resides outside the State and is employed by a service operating in this State; and
(4) Submits an application with a fee in an amount established by the Board

is eligible to apply for a license under this Article. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-506. Violations; enforcement; penalties.

(a) Whenever the Board has reason to believe that a violation of this Article, any rule adopted by the Board, or any order of the Board is occurring or about to occur, the Board may initiate any of the following enforcement measures:

(1) Commence a civil action in any court of the county in which the alleged offender resides or does business. The Board may seek and the court may grant any form of relief, including injunctive relief.
(2) If the activity involved appears to be a criminal offense, refer the matter to the appropriate district attorney for prosecution.
(3) For any person who fails to be licensed as required by this Article, the Board may assess a civil penalty against that person in an amount not to exceed fifty dollars ($50.00) per day for each violation.

(b) In assessing a penalty under subdivision (3) of subsection (a) of this section, the Board shall consider all of the following:

(1) Whether the amount of the penalty imposed will be a substantial economic deterrent to the violator.
(2) The circumstances leading to the violation.
(3) The severity of the violation and the risk of harm to the employee.
(4) Any economic benefits gained by the violator as a result of the violation.

(c) Civil penalties assessed by the Board pursuant to subdivision (3) of subsection (a) of this section are final 30 days after the date the assessment is served upon the alleged violation, unless the alleged violator seeks review by the Board within that time. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-507. Hearings.

Hearings before the Board on enforcement or disciplinary actions shall be conducted in accordance with Article 3A of Chapter 150B of the General Statutes. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-508. Representation as licensed professional.

No person shall, by verbal claim, advertisement, letterhead, card, or in any other way, represent that he or she is a licensed employee assistance professional unless that person possesses a valid license pursuant to this Article. Nothing in this Article shall prohibit an unlicensed person from providing the services described in G.S. 90-500(3) if that person refrains from representing that he or she is a licensed employee assistance professional. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-509. Other prohibited activities.

The Board may deny, suspend, or revoke any license, or otherwise discipline an applicant or holder of a license who the Board finds engaged in one or more of the following activities:

(1) Willfully or repeatedly violating any provision of this Article or any rule of the Board adopted pursuant to this Article.

(2) Fraudulently or deceptively procuring or attempting to procure a license, presenting evidence of qualification to the Board, or processing the examination to secure a license.

(3) Willfully failing to display a license.

(4) Fraudulently or deceptively misrepresenting or engaging in dishonest or illegal practices in or connected with the practice of employee assistance.

(5) Circulating knowingly untrue, fraudulent, misleading, or deceptive advertising.

(6) Engaging in gross malpractice, or a pattern of continued or repeated malpractice, ignorance, negligence, or incompetence in the course of the practice of employee assistance.

(7) Unprofessionally or unethically engaging in practices in connection with the practice of employee assistance, which activities are in violation of the standards of professional conduct prescribed by the Board.

(8) Engaging in conduct reflecting unfavorably upon the profession of employee assistance professionals.

(9) Willfully making any false statement as to material in any oath or affidavit when such statement is required by this Article.

(10) Being convicted of a felony five years prior to applying for a license or while licensed.

(11) Permitting or allowing another to use another person's license for the purpose of providing or offering employee assistance services.

(12) Engaging in practice under a false or assumed name, or impersonating another practitioner of a like, similar, or different name.

(13) Failing to inform clients fully about the limits of confidentiality in a given situation, the purposes for which information is obtained, and how it may be used.

(14) Referring a client to further obtain services from a source that would directly or indirectly financially profit the referring licensed employee assistance professional when these services are not in the best interest of the client.

(15) Denying a client's reasonable requests for access to any records concerning the client, or, when providing clients

with access to records, failing to take due care to protect the confidences of other information contained in those records.

(16) Failing to obtain the informed consent of a client before taping, recording, or permitting third-party observation of the client's activities.

(17) Failing to clarify the nature and directions of an employee assistance professional's loyalties and responsibilities as mandated by law and as mandated by their contractual agreement with a company.

(18) Failing to fully inform consumers as to the purpose and nature of evaluative research, treatment, or educational training or failing to freely acknowledge that a client, student, or participant in research has freedom of choice with regard to his or her participation.

(19) Failing to attempt to terminate a consulting relationship when it is reasonably clear that the relationship is not benefiting the consumer. An employee assistance professional who finds that his or her services are being used by employers beyond their contractual agreement, or beyond their licensed qualification, in a way that is not beneficial to the participants, shall make his or her observations known to the responsible persons and propose modification or termination of the engagement. Upon request, the Board shall advise and clarify in regard to such matters within a reasonable amount of time, and shall not revoke the employee assistance professional's license.

(20) Consenting through a contractual agreement to provide services such as prolonged therapy, that the employee assistance professional is not licensed to provide. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-510. Investigations; good faith reports of violations.

The Board may, on its own motion, investigate any report indicating that a licensee is or may be in violation of the provisions of this Article. Any person who in good faith reports to the Board any such information shall not be subject to suit for civil damages as a result of reporting this information. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

§ 90-511. Employee assistance professional practice by members of other professional groups.

(a) Nothing in this Article shall be construed to prevent qualified members of other professional groups, as determined by the Board, including, but not limited to, licensed psychologists, licensed psychological associates, licensed clinical social workers, nurses, physicians, or members of the clergy, from doing or advertising that they perform the work of an employee assistance professional consistent with the accepted standards of their respective professions.

(b) Nothing in this Article shall be construed to prevent a staff member of a community mental health center from advertising, claiming, working, or in any other way representing that the member is an employee assistance professional consistent with the standards of a mental health center. (1995 (Reg. Sess., 1996), c. 720, s. 1.)

Chapter 90A.

Sanitarians and Water and Wastewater Treatment Facility Operators.

Article 3.

Certification of Water Pollution Control System Operators and Animal Waste Management System Operators.

Part 2. Certification of Animal Waste Management System Operators.

Sec.

90A-47. Purpose.
90A-47.1. Definitions.
90A-47.2. Certified operator in charge required; qualifications for certification.
90A-47.3. Qualifications for certification; training; examination.
90A-47.4. Fees; certificate renewals.
90A-47.5. Suspension; revocation of certificate.
90A-47.6. Rules.
90A-48, 90A-49. [Reserved.]

Article 4.

Registrations of Sanitarians.

90A-53. Qualifications and examination for registration as a sanitarian.
90A-66. Violations; penalty; injunction.

ARTICLE 3.

Certification of Water Pollution Control System Operators and Animal Waste Management System Operators.

Part 1. Certification of Water Pollution Control System Operators.

§ 90A-35. Purpose.

Effect of Amendments. — Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 6(a), effective June 21, 1996, inserted "and Animal Waste Management System Operators" following "Control System Operators" in the title of this article; and added the heading for Part 1.

Part 2. Certification of Animal Waste Management System Operators.

§ 90A-47. Purpose.

The purpose of this Part is to reduce nonpoint source pollution in order to protect the public health and to conserve and protect the quality of the State's water resources, to encourage the development and improvement of the State's agricultural land for the production of food and other agricultural products, and to require the examination of animal waste management system operators and certification of their competency to operate or supervise the operation of those systems. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 23, made this part effective upon ratification (June 21, 1996), except for subsection (a) of G.S. 90A-47.2, which becomes effective January 1, 1997.

Session Laws 1996, c. 626, s. 11 provides: "(a) The Division of Soil and Water Conservation of the Department of Environment, Health, and Natural Resources, the Cooperative Extension Services of North Carolina State University, and the North Carolina Department of Agriculture shall prepare a coordinated and comprehensive plan that includes use of existing resources at the local level for nonpoint source pollution prevention and control. The plan shall include mechanisms to be utilized that enhance communication, and provide information, technical assistance, and environmental education. The plan shall include the following:

"(1) Designate the Division of Soil and Water Conservation of the Department of Environment, Health, and Natural Resources as the lead agency with a defined line of authority for agricultural activities affected by the nonpoint source pollution prevention/control plan.

"(2) Identify the needs of agricultural crop and livestock operations and the services provided by the various groups.

"(3) Develop a strategic plan for interaction and communication with farmers and livestock operations concerning implementation of agricultural best management practices including nutrient management plans and site-specific nutrient reduction efforts.

"(b) The Commissioner of Agriculture, the Secretary of Environment, Health and Natural Resources, and the Director of the Cooperative Extension Service shall report their comprehensive plan to the Senate Select Committee on River Water Quality and Fish Kills and the Environmental Review Commission by September 30, 1996."

Session Laws 1006, c. 626, s. 12, provides: "The Environmental Review Commission shall evaluate the animal waste permitting, inspection, and enforcement program established under Section 1 of this act including, whether to transfer responsibility for permitting, compliance inspections, and enforcement to the Division of Soil and Water Conservation. The commission may report its findings and recommendations to the General Assembly on or before the first day of the 1997 Regular Session and shall report its findings and recommendations on or before the first day of the 1998 Regular Session."

Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 13, provides in part: "A person certified under Part 9A of Article 21 of Chapter 143 of the General Statutes shall be certified as an animal waste management system operator by the Water Pollution Control System Operators Certification Commission without additional preexamination training, examination, or payment of an initial certification fee. A person certified under Part 9A of Article 21 of Chapter 143 of the General Statutes shall complete approved additional training and pay the annual renewal fee in order to maintain certification."

§ 90A-47.1. Definitions.

(a) As used in this Part:

(1) "Animal waste" means liquid residuals resulting from an animal operation that are collected, treated, stored, or applied to the land through an animal waste management system.

(2) "Application" means laying, spreading on, irrigating, or injecting animal waste onto land.

(3) "Commission" means the Water Pollution Control System Operators Certification Commission.

(4) "Operator in charge" means a person who holds a currently valid certificate to operate an animal waste management system and who has primary responsibility for the operation of the system.

(5) "Owner" means the person who owns or controls the land used for agricultural purposes or the person's lessee or designee.

(b) The definitions set out in G.S. 143-215.10B, other than the definition of "animal waste", apply to this Part. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.2. Certified operator in charge required; qualifications for certification.

(a) No owner or other person in control of an animal operation having an animal waste management system shall allow the system to be operated by a person who does not hold a valid certificate as an operator in charge of an animal waste management system issued by the Commission. No person shall perform the duties of an operator in charge of an animal waste management system without being certified under the provisions of this Part. Other persons may assist in the operation of an animal waste management system so long as they are directly supervised by an operator in charge who is certified under this Part.

(b) The owner or other person in control of an animal operation may contract with a certified animal waste management system operator in charge to provide for the operation of the animal waste management system at that animal operation. The Commission may adopt rules requiring that any certified animal waste management system operator in charge who contracts with one or more owners or other persons in control of an animal operation file an annual report with the Commission as to the operation of each system at which the services of the operator in charge are provided. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 626, s. 23, made this section effective upon ratification (June 21, 1996), except for subsection (a), which becomes effective January 1, 1997.

§ 90A-47.3. Qualifications for certification; training; examination.

(a) The Commission shall develop and administer a certification program for animal waste management system operators in charge that provides for receipt of applications, training and examination of applicants, and investigation of the qualifications of applicants.

(b) The Commission, in cooperation with the Division of Water Quality of the Department of Environment, Health, and Natural Resources, and the Cooperative Extension Service, shall develop and administer a training program for animal waste management system operators in charge. An applicant for initial certification shall complete 10 hours of classroom instruction prior to taking the examination. In order to remain certified, an animal waste management system operator in charge shall complete six hours of approved additional training during each three-year period following initial certification. A certified animal waste management system operator in charge who fails to complete approved additional training within 30 days of the end of the three-year period shall take and pass the examination for certification in order to renew the certificate. (1995

(Reg. Sess., 1996), c. 626, s. 6(b); 1996, 2nd Ex. Sess., c. 18, s. 27.34(c).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — Session Laws 1996, Second Extra Session, c. 18, s. 27.34(c), effective July 1, 1996, substituted "Division of Water Quality" for "Division of Environmental Management" in subsection (b).

§ 90A-47.4. Fees; certificate renewals.

(a) An applicant for certification under this Part shall pay a fee of ten dollars ($10.00) for the examination and the certificate.

(b) The certificate shall be renewed annually upon payment of a renewal fee of ten dollars ($10.00). A certificate holder who fails to renew the certificate and pay the renewal fee within 30 days of its expiration shall be required to take and pass the examination for certification in order to renew the certificate. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.5. Suspension; revocation of certificate.

(a) The Commission, in accordance with the provisions of Chapter 150B of the General Statutes, may suspend or revoke the certificate of any operator in charge who:

(1) Engages in fraud or deceit in obtaining certification.

(2) Fails to exercise reasonable care, judgment, or use of the operator's knowledge and ability in the performance of the duties of an operator in charge.

(3) Is incompetent or otherwise unable to properly perform the duties of an operator in charge.

(b) In addition to revocation of a certificate, the Commission may levy a civil penalty, not to exceed one thousand dollars ($1,000) per violation, for willful violation of the requirements of this Part. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§ 90A-47.6. Rules.

The Commission shall adopt rules to implement the provisions of this Part. (1995 (Reg. Sess., 1996), c. 626, s. 6(b).)

§§ 90A-48, 90A-49: Reserved for future codification purposes.

ARTICLE 4.

Registrations of Sanitarians.

§ 90A-50. State Board of Sanitarian Examiners.

CASE NOTES

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

§ 90A-51. Definitions.

CASE NOTES

Applied in Gray v. Laws, 51 F.3d 426 (4th Cir. 1995).

§ 90A-53. Qualifications and examination for registration as a sanitarian.

The Board shall issue certificates to qualified persons as registered sanitarians. A certificate as a registered sanitarian shall be issued to any person upon the Board's determination that such person:

(1) Has made application to the Board on a form prescribed by the Board;

(2) Is of good moral character;

(3) **(Effective until January 1, 1998)** Has received a baccalaureate degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 25 semester hours or its equivalent in the physical and/or biological sciences;

(3) **(Effective January 1, 1998)** Has received a baccalaureate degree from a post-secondary educational institution rated as acceptable by the Board with a minimum of 30 semester hours or its equivalent in the physical and/or biological sciences;

(4) Has satisfactorily completed a course in specialized instruction and training approved by the Board which course shall be designed as to content and so administered as to present sufficient knowledge of the needs properly to be served by public health sanitation, the elements of good environmental health sanitation, the laws and regulations governing sanitation in environmental health and the protection of the public health;

(5) Has had at least two years' experience in the field of environmental health as defined in this Article. Provided, however, that only one year of experience in the field of environmental health as defined in this Article is required of a sanitarian intern who is a graduate of a bachelor's or master's degree program that is accredited by the National Accreditation Council for Environmental Health Curricula of the National Environmental Health Association.

(6) Has passed an examination administered by the Board designed to test for competence in the subject matters of environmental health sanitation. The examination shall be in a form prescribed by the Board and may be oral, written, or both. The examination for applicants shall be held annually or more frequently as the Board may by rule prescribe, at a time and place to be determined by the Board. A person shall not be registered if such person fails to meet the minimum grade requirements for examination specified by the Board. Failure to pass an examination shall not prohibit such person from being examined at subsequent times and places as specified by the Board; and

§ 90A-53(3) is set out twice. See notes.

(7) Has paid a fee set by the Board not to exceed the cost of the examination. (1959, c. 1271, s. 6; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1989, c. 545, s. 2; 1993, c. 233, ss. 1-3.)

Subdivision (3) Set Out Twice. — The first version of subdivision (3) as set out above is effective until January 1, 1998. The second version of subdivision (3) as set out above is effective January 1, 1998.

Editor's Note. — Session Laws 1993, c. 233, s. 1, which amended this section, was effective January 1, 1994, and applicable to applications for registration received on or after that date.

Effect of Amendments. — Session Laws 1993, c. 233, s. 2, effective January 1, 1996, and applicable to applications for registration received on or after that date, substituted "25" for "20" in subdivision (3).

Session Laws 1993, c. 233, s. 3, effective January 1, 1998, and applicable to applications for registration received on or after that date, substituted "30" for "25" in subdivision (3).

§ 90A-66. Violations; penalty; injunction.

Any person violating any of the provisions of this Article or of the rules and regulations adopted by the Board shall be guilty of a Class 1 misdemeanor. The Board may appear in its own name in the superior courts in an action for injunctive relief to prevent violation of this Article and the superior courts shall have power to grant such injunctions regardless of whether criminal prosecution has been or may be instituted as a result of such violations. Actions under this section shall be commenced in the superior court district or set of districts as defined in G.S. 7A-41.1 in which the respondent resides or has his principal place of business or in which the alleged acts occurred. (1959, c. 1271, s. 13; 1981 (Reg. Sess., 1982), c. 1274, s. 2; 1987 (Reg. Sess., 1988), c. 1037, s. 104; 1993, c. 539, s. 653; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 653, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 90B.

Social Worker Certification Act.

Sec.
90B-6. Functions and duties of the Certification Board.
90B-10. Exemption from certain requirements.
Sec.
90B-12. Violation a misdemeanor.

§ 90B-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90B-5. North Carolina Certification Board for Social Work; appointments; terms; composition.

Editor's Note. —

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.2, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1996-97 fiscal year, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1996-97 fiscal year."

Session Laws 1991, c. 732, s. 8, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 24.11, provides: "The term of the additional Board position for clinical social worker created by this act shall commence upon the expiration of the term of the public member whose term expires first."

§ 90B-6. Functions and duties of the Certification Board.

(a) The Board shall administer and enforce the provisions of this Chapter.

(b) The Board shall elect from its membership, a chairperson, a vice-chairperson, and secretary-treasurer, and adopt rules to govern its proceedings. A majority of the membership shall constitute a quorum for all Board meetings.

(c) The Board shall examine and pass on the qualifications of all applicants for certificates under this Chapter, and shall issue a certificate to each successful applicant therefor.

(d) The Board may adopt a seal which may be affixed to all certificates issued by the Board.

(e) The Board may authorize expenditures deemed necessary to carry out the provisions of this Chapter from the fees which it collects, but in no event shall expenditures exceed the revenues of the Board during any fiscal year. No State appropriations shall be subject to the administration of the Board.

(f) The Board shall establish and receive fees not to exceed fifty dollars ($50.00) for initial or renewal application. Fees for the national written examination shall be the cost of the examination to the Board plus an additional fee not to exceed fifty dollars ($50.00). The fee for late renewal shall not exceed fifteen dollars ($15.00). The

Board shall maintain accounts of all receipts and make expenditures from Board receipts for any purpose which is reasonable and necessary for the proper performance of its duties under this Chapter.

(g) The Board shall have the power to establish or approve study or training courses and to establish reasonable standards for certification and certificate renewal, including but not limited to the power to adopt or use examination materials and accreditation standards of the Council on Social Work Education or other recognized accrediting agency and the power to establish reasonable standards for continuing social work education; provided that for certificate renewal no examination shall be required; provided further, that the Board shall not have the power to withhold approval of study or training courses offered by a college or university having a social work program approved by the Council on Social Work Education.

(h) Subject to the provisions of Chapter 150B of the General Statutes, the Board shall have the power to adopt, amend, or rescind rules and regulations to carry out the purposes of this Chapter, including but not limited to the power to adopt ethical and disciplinary standards. (1983, c. 495, s. 1; 1987, c. 827, s. 1; 1995, c. 344, s. 1.)

Effect of Amendments. — The 1995 amendment, effective July 1, 1995 and applicable to fees due on or after that date, in subsection (f) divided the former subsection into the first and last sentences of the present subsection, deleted "not to exceed one hundred dollars ($100.00) for examination, and not to exceed fifteen dollars ($15.00) for late renewal, maintain Board accounts of all receipts" at the end of the first sentence, added the second and third sentences, and added "The Board shall maintain accounts of all receipts" in the last sentence.

§ 90B-10. Exemption from certain requirements.

(a) Applicants who were engaged in the practice of social work before January 1, 1984, shall be exempt from the academic qualifications required by this act for Certified Social Workers and Certified Social Work Managers and shall be certified upon passing the Board examination and meeting the experience requirements, if any, for certification of persons in that classification.

(b) The following may engage in clinical social work practice without meeting the requirements of G.S. 90B-7(d):

(1) A person who has engaged in clinical social work practice for one year prior to the effective date of this act and who properly applies for and pays the required fees for a certificate as a certified clinical social worker prior to January 1, 1993. Notwithstanding the foregoing provision of this subdivision, any applicant who applied for certification pursuant to this subdivision between December 1, 1993, and January 15, 1994, and who is otherwise eligible for certification under this subdivision but for the January 1, 1993, deadline shall be certified.

(2) A student completing a clinical requirement for graduation while pursuing a course of study in social work in an institution accredited by or in candidacy status with the Council on Social Work Education.

§ 90B-10(3)a. has a delayed repeal date. See notes.

(3) An employee engaged in clinical social work practice exclusively for one of the following employers:

a. **(Effective until January 1, 1999)** The State, a political subdivision of the State, or a local government.

b. A hospital or health care facility licensed pursuant to Article 2 of Chapter 122C of the General Statutes or Articles 5 and 6 of Chapter 131E of the General Statutes. (1983, c. 495, s. 1; 1991, c. 732, s. 5; 1993 (Reg. Sess., 1994), c. 745, s. 38.1; 1996, 2nd Ex. Sess., c. 18, s. 24.11.)

Editor's Note. —

Session Laws 1991, c. 732, s. 8, as amended by Session Laws 1996, Second Extra Session, c. 18, s. 24.11, provides: "G.S. 90B-10(b)(3)a. is repealed effective January 1, 1999."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective July 1, 1996, amended Session Laws 1991, c. 732, s. 8, by changing the repeal date of subdivision (b)(3)a. to January 1, 1999.

§ 90B-12. Violation a misdemeanor.

Any person violating any provision of this Chapter is guilty of a Class 2 misdemeanor. (1983, c. 495, s. 1; 1993, c. 539, s. 654; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 654, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 90C.

Therapeutic Recreation Personnel Certification Act.

Sec.
90C-5. State Board of Therapeutic Recreation Certification created.
90C-7. Executive Director.

§ 90C-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 90C-5. State Board of Therapeutic Recreation Certification created.

(a) The North Carolina State Board of Therapeutic Recreation Certification is created.

(b) Composition. — The Board shall consist of seven members appointed as follows:

(1) Three practicing therapeutic recreation specialists, one each appointed by the Governor, the General Assembly upon the recommendation of the President Pro Tempore of the Senate, and the General Assembly upon the recommendation of the Speaker of the House of Representatives;

(2) One therapeutic recreation specialist who is engaged primarily in providing training for therapeutic recreation specialists or therapeutic recreation assistants and one therapeutic recreation assistant, each appointed by the Governor; and

(3) Two public members, one appointed by the General Assembly upon the recommendation of the President Pro Tempore of the Senate and one appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives.

The Governor shall make his initial appointments after consultation with the North Carolina Recreation and Park Society and other interested persons and thereafter shall make his appointments after consultation with the Board.

(c) Qualifications. — The nonpublic members of the Board shall hold a current certificate. Each nonpublic member of the Board, at the time of his appointment and for at least two years before, shall have been actively engaged in North Carolina in the practice of therapeutic recreation, or in the education and training of graduate or undergraduate students of therapeutic recreation, or in therapeutic recreation research. The first nonpublic members of this Board shall immediately become certified by complying with the provisions of this Chapter.

A public member shall not be a licensed health care professional or an agent or employee of any health care institution, health care insurer, health care professional school, or a member of any allied health profession. For purposes of this subsection, a person enrolled in a program to prepare him to be a licensed health care professional or an allied health professional shall not be eligible to serve as a public member of the Board. The spouse of any person who would be prohibited by this subsection from serving on the Board as a public member shall not serve as a public member of the Board. Public members shall reasonably reflect the population of this State.

(d) Term. — Each member shall be appointed for a term of three years and shall serve until a successor is appointed. Of the members initially appointed, one practicing therapeutic recreation specialist appointed by the Governor, and one public member appointed by the General Assembly upon the recommendation of the President of the Senate shall continue in office for one year; one therapeutic recreation specialist appointed by the General Assembly upon the recommendation of the President of the Senate, one therapeutic recreation assistant appointed by the Governor, and one public member appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives shall continue in office for two years; and one therapeutic recreation specialist appointed by the General Assembly upon the recommendation of the Speaker of the House of Representatives and one therapeutic recreation specialist engaged primarily in the education of therapeutic recreation specialists or therapeutic recreation assistants appointed by the Governor shall continue in office for three years. The terms of all initial appointments shall commence on June 30, 1987. No member shall serve more than two consecutive full terms.

(e) Vacancies. — The Governor shall fill vacancies to the Board positions for which he is the appointing authority within 30 days after a position is vacated. The General Assembly shall fill vacancies for which it is the appointing authority in accordance with G.S. 120-122. Appointees shall serve the remainder of the unexpired term and until their successors have been appointed and qualified.

(f) Removal. — The Board may remove any of its members for gross neglect of duty, incompetence, or unprofessional conduct. A member subject to disciplinary proceedings shall be disqualified from Board business until the charges are resolved. The Governor may also remove any member for gross neglect of duty, incompetence, or unprofessional conduct.

(g) Compensation. — Each member of the Board shall receive such per diem compensation and reimbursement for travel and subsistence as shall be set for licensing Board members generally, as provided in G.S. 93B-5.

(h) Officers. — The officers of the Board shall be a chairman, a vice-chairman and other officers deemed necessary by the Board to carry out the purposes of this Chapter. All officers shall be elected annually by the Board for one-year terms and shall serve until their successors are elected and qualified.

(i) Meetings. — The Board shall hold at least two meetings each year to conduct business, and shall adopt rules governing the calling, holding, and conducting of regular and special meetings. A majority of the Board members shall constitute a quorum.

(j) Employees. — The Board may employ necessary personnel for the performance of its functions, and fix their compensation, within the limits of the funds available to the Board.

(k) The total expense of the administration of this Chapter shall not exceed the total income from fees collected pursuant to this Chapter. None of the expenses of the Board, or the compensation or expenses of any officer or any employee of the Board shall be paid or payable out of the general fund. Neither the Board nor any of its officers or employees may incur any expense, debt, or other financial obligation binding upon the State. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1995, c. 490, s. 59.)

Editor's Note. — Session Laws 1995, c. 490, which amended this section, in s. 65 provides: "This act applies with respect to terms beginning on or after January 1, 1997, and to vacancies occurring on or after that date regardless of the date the term began."

Effect of Amendments. — The 1995 amendment added "Pro Tempore" in subdivisions (b)(1) and (b)(3). For the applicability of this amendment, see editor's note.

§ 90C-7. Executive Director.

The Executive Director shall deposit all fees payable to the Board in financial institutions designated by the Board as official depositories. The funds shall be deposited in the name of the Board and shall be used to pay all expenses incurred by the Board in carrying out the purposes of this Chapter. (1985 (Reg. Sess., 1986), c. 966, s. 1; 1987, c. 23, s. 1; 1993, c. 257, s. 6.)

Chapter 91A.

Pawnbrokers Modernization Act of 1989.

Sec.
91A-8. Pawnbroker fees; interest rates.
91A-11. Penalties.

§ 91A-1. Short title.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 91A-8. Pawnbroker fees; interest rates.

No pawnbroker shall demand or receive an effective rate of interest greater than two percent (2%) per month, and no other charge of any description or for any purpose shall be made by the pawnbroker, except that the pawnbroker may charge, contract for, and recover an additional monthly fee for the following services, including but not limited to:

(1) Title investigation;
(2) Handling, appraisal, and storage;
(3) Insuring a security;
(4) Application fee;
(5) Making daily reports to local law enforcement officers; and
(6) For other expenses, including losses of every nature, and all other services.

In no event may the total of the above listed monthly fees on a pawn transaction exceed twenty percent (20%) of the principal up to a maximum of the following:

First month	$100.00
Second month	75.00
Third month	75.00
Fourth month and thereafter	50.00

In addition, pawnbrokers may charge fees for returned checks as allowed by G.S. 25-3-506. (1989, c. 638, s. 2; 1995 (Reg. Sess., 1996), c. 742, s. 37.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective June 21, 1996, substituted "25-3-506" for "25-3-512" at the end of the section.

§ 91A-11. Penalties.

(a) Every person, firm, or corporation, their guests or employees, who shall knowingly violate any of the provisions of this Chapter, shall, on conviction thereof, be deemed guilty of a Class 2 misdemeanor. If the violation is by an owner or major stockholder or managing partner of the pawnshop and the violation is knowingly committed by the owner, major stockholder, or managing partner of the pawnshop, then the license of the pawnshop may be suspended at the discretion of the court.

(b) The provision of subsection (a) shall not apply to violations of G.S. 91A-10(6) which shall be prosecuted under the North Carolina criminal statutes.

(c) Any contract of pawn the making or collecting of which violates any provision of this Chapter, except as a result of accidental or bona fide error of computation, shall be void, and the licensee shall have no right to collect, receive or retain any interest or fee whatsoever with respect to such pawn. (1989, c. 638, s. 2; 1993, c. 539, s. 655; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 655, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 93A.

Real Estate License Law.

Article 1.

Real Estate Brokers and Salesmen.

Sec.
93A-1. License required of real estate brokers and real estate salesmen.
93A-2. Definitions and exceptions.
93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.
93A-11. Reimbursement by real estate independent contractor of brokers' workers' compensation.

ARTICLE 1.

Real Estate Brokers and Salesmen.

§ 93A-1. License required of real estate brokers and real estate salesmen.

From and after July 1, 1957, it shall be unlawful for any person, partnership, corporation, limited liability company, association, or other business entity in this State to act as a real estate broker or real estate salesman, or directly or indirectly to engage or assume to engage in the business of real estate broker or real estate salesman or to advertise or hold himself or themselves out as engaging in or conducting such business without first obtaining a license issued by the North Carolina Real Estate Commission (hereinafter referred to as the Commission), under the provisions of this Chapter. (1957, c. 744, s. 1; 1969, c. 191, s. 1; 1983, c. 81, ss. 1, 2; 1995, c. 351, s. 19.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "corporation, limited liability company, association, or other business entity" for "association or corporation" preceding "in this State".

CASE NOTES

One who conducts activities pursuant to a finder's fee contract is engaged indirectly in the business of being a real estate broker or salesperson. Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

§ 93A-2. Definitions and exceptions.

(a) A real estate broker within the meaning of this Chapter is any person, partnership, corporation, limited liability company, association, or other business entity who for a compensation or valuable consideration or promise thereof lists or offers to list, sells or offers to sell, buys or offers to buy, auctions or offers to auction (specifically not including a mere crier of sales), or negotiates the purchase or sale or exchange of real estate, or who leases or offers to lease, or who sells or offers to sell leases of whatever character, or rents or offers to rent any real estate or the improvement thereon, for others.

(b) The term real estate salesman within the meaning of this Chapter shall mean and include any person who under the supervision of a real estate broker, for a compensation or valuable consideration is associated with or engaged by or on behalf of a licensed real estate broker to do, perform or deal in any act, acts or transactions set out or comprehended by the foregoing definition of real estate broker.

(c) The provisions of this Chapter shall not apply to and shall not include:

(1) Any person, partnership, corporation, limited liability company, association, or other business entity who, as owner or lessor, shall perform any of the acts aforesaid with reference to property owned or leased by them, where the acts are performed in the regular course of or as incident to the management of that property and the investment therein;

(2) Any person acting as an attorney-in-fact under a duly executed power of attorney from the owner authorizing the final consummation of performance of any contract for the sale, lease or exchange of real estate;

(3) The acts or services of an attorney-at-law;

(4) Any person, while acting as a receiver, trustee in bankruptcy, guardian, administrator or executor or any person acting under order of any court;

(5) Any person, while acting as a trustee under a trust agreement, deed of trust or will, or his regular salaried employees;

(6) Any salaried person employed by a licensed real estate broker, for and on behalf of the owner of any real estate or the improvements thereon, which the licensed broker has contracted to manage for the owner, if the salaried employee is limited in his employment to: exhibiting units on the real estate to prospective tenants; providing the prospective tenants with information about the lease of the units; accepting applications for lease of the units; completing and executing preprinted form leases; and accepting security deposits and rental payments for the units only when the deposits and rental payments are made payable to the owner or the broker employed by the owner. The salaried employee shall not negotiate the amount of security deposits or rental payments and shall not negotiate leases or any rental agreements on behalf of the owner or broker; or

(7) Any owner who personally leases or sells his own property. (1957, c. 744, s. 2; 1967, c. 281, s. 1; 1969, c. 191, s. 2; 1975, c. 108; 1983, c. 81, ss. 4, 5; 1985, c. 535, s. 1; 1995, c. 351, s. 20.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, substituted "corporation, limited liability company, association, or other business entity" for "association or corporation" preceding "who for a compensation" in subsection (a) and also preceding "who, as owner or lessor" in subdivision (c)(1).

§ 93A-4. Applications for licenses; fees; qualifications; examinations; bond; privilege licenses; renewal or reinstatement of license; power to enforce provisions.

(a) Any person, partnership, association, or corporation hereafter desiring to enter into business of and obtain a license as a real estate broker or real estate salesman shall make written application for such license to the Commission on such forms as are prescribed by the Commission. Each applicant for a license as a real estate broker or real estate salesman shall be at least 18 years of age. Each applicant for a license as a real estate salesman shall, within five years preceding the date application is made, have satisfactorily completed, at a school approved by the Commission, a real estate fundamentals course consisting of at least 30 hours of classroom instruction in subjects determined by the Commission, or possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the course. Each applicant for a license as a real estate broker shall, within five years preceding the date the application is made, either have been actively engaged on a full-time basis as a licensed real estate salesman for at least two years, or have satisfactorily completed, at a school approved by the Commission, advanced courses in Real Estate Law, Real Estate Finance, and Real Estate Brokerage Operations, each consisting of at least 30 hours of classroom instruction, these courses to be in addition to those required for a real estate salesman license, or possess real estate education or experience in real estate transactions which the Commission shall find equivalent to the above requirements. Each application for license as a real estate broker shall be accompanied by a fee, fixed by the Commission but not to exceed thirty dollars ($30.00). Each application for license as a real estate salesman shall be accompanied by a fee, fixed by the Commission but not to exceed thirty dollars ($30.00).

(b) Any person who files such application to the Commission in proper manner for a license as real estate broker or a license as real estate salesman shall be required to take an oral or written examination to determine his qualifications with due regard to the paramount interests of the public as to the honesty, truthfulness, integrity and competency of the applicant.

The Commission may make such investigation as it deems necessary into the ethical background of the applicant. If the results of the examination and investigation shall be satisfactory to the Commission, then the Commission shall issue to such a person a license, authorizing such person to act as a real estate broker or real estate salesman in the State of North Carolina, upon the payment of privilege taxes now required by law or that may hereafter be required by law.

Provided, however, that any person who, at the time of the passage or at the effective date of this Chapter, has a license to engage in, and is engaged in business as a real estate broker or real estate salesman and who shall file a sworn application with the Commission setting forth his qualifications, including a statement that such applicant has not within five years preceding the filing of the application been convicted of any felony or any misdemeanor involving moral turpitude, shall not be required to take or pass such examination, but all such persons shall be entitled to receive such license from the Commission under the provisions of this Chapter on proper application therefor and payment of a fee of ten dollars ($10.00).

(c) All licenses issued by the Commission under the provisions of this Chapter shall expire on the 30th day of June following issuance or on any other date that the Commission may determine and shall become invalid after that date unless reinstated. A license may be renewed 45 days prior to the expiration date by filing an application with and paying to the Executive Director of the Commission the license renewal fee. The license renewal fee is thirty dollars ($30.00) unless the Commission sets the fee at a higher amount. The Commission may set the license renewal fee at an amount that does not exceed fifty dollars ($50.00). The license renewal fee may not increase by more than five dollars ($5.00) during a 12-month period. The Commission may adopt rules establishing a system of license renewal in which the licenses expire annually with varying expiration dates. These rules shall provide for prorating the annual fee to cover the initial renewal period so that no licensee shall be charged an amount greater than the annual fee for any 12-month period. All licenses reinstated after the expiration date thereof shall be subject to a late filing fee of five dollars ($5.00) in addition to the required renewal fee. In the event a licensee fails to obtain a reinstatement of such license within 12 months after the expiration date thereof, the Commission may, in its discretion, consider such person as not having been previously licensed, and thereby subject to the provisions of this Chapter relating to the issuance of an original license, including the examination requirements set forth herein. Duplicate licenses may be issued by the Commission upon payment of a fee of five dollars ($5.00) by the licensee. Commission certification of a licensee's license history shall be made only after the payment of a fee of ten dollars ($10.00).

(d) The Commission is expressly vested with the power and authority to make and enforce any and all such reasonable rules and regulations connected with the application for any license as shall be deemed necessary to administer and enforce the provisions of this Chapter. The Commission is further authorized to adopt rules and regulations necessary for the approval of real estate schools and such rules and regulations may, in accordance with G.S. 93A-4(a), prescribe specific requirements pertaining to the teaching of mechanics and law governing real estate transactions at such schools.

(e) Nothing contained in this Chapter shall be construed as giving any authority to the Commission nor any licensee of the Commission as authorizing any licensee whether by examination or under the grandfather clause or by comity to engage in the practice of law or to render any legal service as specifically set out in G.S. 84-2.1 or any other legal service not specifically referred to in said section. (1957, c. 744, s. 4; 1967, c. 281, s. 3; c. 853, s. 2; 1969, c. 191, s. 3; 1973, c. 1390; 1975, c. 112; 1979, c. 614, ss. 2, 3, 6; c. 616, ss. 2-5; 1983, c. 81, ss. 2, 9, 11; c. 384; 1985, c. 535, ss. 2-5; 1995, c. 22, s. 1.)

Effect of Amendments. — The 1995 amendment, effective April 4, 1995 and applicable to applications for a license or for renewal of a license filed on or after that date, in subsection (b), in the second paragraph, deleted the last sentence, which read "Anyone failing to pass an examination may be reexamined without payment of additional fee, under such rules as the Commission may adopt in such cases"; and in subsection (c), in the second sentence substituted "license renewal fee" for "fee required by the Commission, which may not exceed twenty-five dollars ($25.00)", and added the present third, fourth, and fifth sentences.

§ 93A-6. Disciplinary action by Commission.

CASE NOTES

Failure to Check Federal Flood Hazard Maps. — Because mere inaction does not constitute negligence in the absence of a duty to act and real estate agent was under no duty to search the federal flood hazard maps, the fact that she did not search these maps, discover that the property was located in a flood plain, and inform plaintiffs could not constitute a negligent omission under subdivision (a)(1). Clouse v. Gordon, 115 N.C. App. 500, 445 S.E.2d 428 (1994).

Cited in Davis v. Sellers, 115 N.C. App. 1, 443 S.E.2d 879 (1994), cert. denied, 339 N.C. 610, 454 S.E.2d 248 (1995).

§ 93A-11. Reimbursement by real estate independent contractor of brokers' workers' compensation.

(a) Notwithstanding the provisions of G.S. 97-21 or any other provision of law, a real estate broker may include in the governing contract with a real estate salesman whose nonemployee status is recognized pursuant to section 3508 of the United States Internal Revenue Code, 26 U.S.C. § 3508, an agreement for the salesman to reimburse the broker for the cost of covering that salesman under the broker's workers' compensation coverage of the broker's business.

(b) Nothing in this section shall affect a requirement under any other law to provide workers' compensation coverage or in any manner exclude from coverage any person, firm, or corporation otherwise subject to the provisions of Article 1 of Chapter 97 of the General Statutes. (1995, c. 127, s. 1.)

Editor's Note. — Session Laws 1995, c. 127, s. 2, provides that this section is effective upon ratification (May 30, 1995) and applies to any governing contract between a real estate broker and a real estate salesman entered into on or after that date.

Chapter 93B.

Editor's Note. — The legislation and annotations affecting Chapter 93B have been included in a recently published replacement chapter.

Chapter 93D.

North Carolina State Hearing Aid Dealers and Fitters Board.

Sec.
93D-6. Persons selling in other jurisdictions.
93D-15. Violation of Chapter.

§ 93D-1. Definitions.

Legal Periodicals. — For article, "The Learned Profession Exemption of the North Carolina Deceptive Trade Practices Act: The Wrong Bright Line?," see 15 Campbell L. Rev. 223 (1993).

§ 93D-6. Persons selling in other jurisdictions.

Whenever the Board determines that another state or jurisdiction has requirements at least equivalent to those in effect pursuant to this Chapter for the fitting and selling of hearing aids, and that such state or jurisdiction has a program at least equivalent to the program for determining whether applicants pursuant to this Chapter are qualified to sell and fit hearing aids, the Board may issue, but is not compelled to issue, licenses to applicants therefor who hold current, unsuspended and unrevoked certificates or licenses to fit and sell hearing aids in such other state or jurisdiction. No such applicant shall be required to submit to any examination or other procedure required by G.S. 93D-5, but shall be required to pay an application fee to the Board in an amount set by the Board, not to exceed one hundred fifty dollars ($150.00). Such applicant must have one full year of experience satisfactory to the Board before issuance of the license. (1969, c. 999; 1971, c. 1093, s. 2; 1981, c. 990, s. 2; 1991, c. 592, s. 3; 1991 (Reg. Sess., 1992), c. 1030, s. 24.)

§ 93D-15. Violation of Chapter.

Any person who violates any of the provisions of this Chapter and any person who holds himself out to the public as a fitter and seller of hearing aids without having first obtained a license or apprenticeship registration as provided for herein shall be deemed guilty of a Class 2 misdemeanor. (1969, c. 999; 1981, c. 601, s. 20; 1993, c. 539, s. 660; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 660, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Chapter 93E.

North Carolina Appraisers Act.

Article 1.

Real Estate Appraiser.

Sec.
93E-1-5. Appraisal Board.

ARTICLE 1.

Real Estate Appraiser.

§ 93E-1-5. Appraisal Board.

(a) There is created the North Carolina Appraisal Board for the purposes set forth in this Chapter. The Board shall consist of seven members. The Governor shall appoint five members of the Board, and the General Assembly shall appoint two members in accordance with G.S. 120-121, one upon the recommendation of the President Pro Tempore of the Senate and one upon the recommendation of the Speaker of the House of Representatives. Each member appointed by the Governor shall be appointed from a different congressional district. The appointee recommended by the Speaker of the House of Representatives and the appointees of the Governor shall be persons who have been engaged in the business of real estate appraising in this State for at least five years immediately preceding their appointment and are also State-licensed or State-certified real estate appraisers. No more than four of the appointees may be members of the same appraiser trade organization, group, or committee at any one time. The appointee recommended by the President Pro Tempore of the Senate shall be a person not involved directly or indirectly in the real estate, real estate appraisal, or the real estate lending industry. Members of the Board shall serve three-year terms, so staggered that the terms of three members expire in one year, the terms of two members expire in the next year, and the terms of two members expire in the third year of each three-year period. The members of the Board shall elect one of their members to serve as chairman of the Board for a term of one year. The Governor may remove any member of the Board appointed by the Governor for misconduct, incompetency, or neglect of duty. The General Assembly may remove any member appointed by it for the same reasons. Successors shall be appointed by the appointing authority making the original appointment. All vacancies occurring on the Board shall be filled, for the unexpired term, by the appointing authority making the original appointment. Vacancies in appointments made by the General Assembly shall be filled in accordance with G.S. 120-122. Initial terms of office commence July 1, 1994.

(b) The Board is an occupational licensing agency governed by Chapter 150B of the General Statutes; its decisions are final agency decisions subject to judicial review under Article 4 of Chapter 150B of the General Statutes.

(c) Members of the Board shall be paid the per diem, subsistence, and travel allowances at the rates set forth in G.S. 93B-5; provided that none of the expenses of the Board or the compensation or expenses of any officer or employee thereof shall be payable out of the treasury of the State of North Carolina; the total expenses of the administration of this Chapter shall not exceed the total income therefrom; and neither the Board nor any officer or employee thereof shall have any power or authority to make or incur any expense, debt, or other financial obligation binding upon the State of North Carolina.

(d) The Board shall adopt a seal for its use, which shall bear thereon the words "North Carolina Appraisal Board". Copies of all papers in the office of the Board duly certified and authenticated by the seal of the Board shall be received in evidence in all courts and administrative bodies and with like effect as the originals.

(e) The Board may employ an Executive Director and professional and clerical staff as may be necessary to carry out the provisions of this Chapter and to put into effect the rules that the Board may promulgate. The Board shall fix salaries. The Board shall have the authority to issue to its employees credentials or other means of identification.

(f) The Board shall be entitled to the services of the Attorney General in connection with the affairs of the Board or may, in its discretion, employ an attorney to assist or represent it in the enforcement of this Chapter.

(g) The Board may prefer a complaint for violation of this Chapter before any court of competent jurisdiction, and it may take the necessary legal steps through the proper legal offices of the State to enforce the provisions of this Chapter. (1993, c. 419, s. 6; 1995, c. 482, s. 5; 1996, 2nd Ex. Sess., c. 15, s. 16.)

Effect of Amendments. — The 1996 Second Extra Session amendment, effective August 3, 1996, substituted "four of the appointees" for "three of the appointees" in the sixth sentence of subsection (a).

Chapter 94.

Apprenticeship.

§ 94-6. Definition of an apprentice.

CASE NOTES

Cited in Varnell v. Henry M. Milgrom, Inc., 78 N.C. App. 451, 337 S.E.2d 616 (1985).

Chapter 95.

Department of Labor and Labor Regulations.

Article 2A.

Wage and Hour Act.

Sec.
95-25.5. Youth employment.
95-25.14. Exemptions.

Article 5A.

Regulation of Private Personnel Services.

95-47.4. Contracts; contents; approval; tying contracts forbidden.
95-47.7. Private Personnel Service Advisory Council.

Article 6.

Separate Toilets for Sexes.

95-48 through 95-53. [Repealed.]

Article 14.

Inspection Service Fees.

95-107. Assessment and collection of fees; certificates of safe operation.

Article 14A.

Elevator Safety Act of North Carolina.

95-110.5. Powers and duties of Commissioner.

Article 14B.

Amusement Device Safety Act of North Carolina.

Sec.
95-111.12. Liability insurance.

Article 19.

Migrant Housing Act of North Carolina.

95-229.1 through 95-229.4. [Reserved.]

Article 19A.

Overhead High-Voltage Line Safety Act.

95-229.5. Purpose; scope.
95-229.6. Definitions.
95-229.7. Prohibited activities.
95-229.8. Warning signs.
95-229.9. Notification.
95-229.10. Precautionary safety arrangements.
95-229.11. Exemptions.
95-229.12. Application.
95-229.13. Severability.

Article 20.

Controlled Substance Examination Regulation.

95-232. Procedural requirements for the administration of controlled substance examinations.

ARTICLE 2A.

Wage and Hour Act.

§ 95-25.1. Short title and legislative purpose.

CASE NOTES

Claim for Unpaid Bonus. — Plaintiff's state claims presented complex and unsettled issues of North Carolina law which would be more appropriately resolved by a North Carolina court including the proper definition of "handicapped person" under § 143-422.2, part of the North Carolina Equal Employment Practices Act; and the proper analysis of this act, with its accompanying administrative regulations in the North Carolina Administrative Code, in the context of the plaintiff's claim for an unpaid bonus. McCullough v. Branch Banking & Trust Co., 844 F. Supp. 258 (E.D.N.C. 1993), aff'd, 35 F.3d 127 (4th Cir. 1994).

Liquidated Damages. — The employer bears the burden of demonstrating that liquidated damages should not be imposed; however, even if an employer shows that it acted in good faith, and with the belief that its action did not constitute a violation of the Wage and Hour Act, the trial court may still, in its discretion, award liquidated damages in any amount up to the amount due for unpaid wages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.2. Definitions.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Cited in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.5. Youth employment.

(a) No youth under 18 years of age shall be employed by any employer in any occupation without a youth employment certificate unless specifically exempted. The Commissioner of Labor shall prescribe regulations for youths and employers concerning the issuance, maintenance and revocation of certificates. Certificates will be issued, subject to review by the Department of Labor, by county directors of social services and such of their designees as are approved by the Commissioner; provided, the Commissioner may by regulation require that the Department of Labor issue certificates for occupations with unusual or unique characteristics.

(a1) During the regular school term, no youth under 18 years of age who is enrolled in school in grade 12 or lower may be employed between 11 P.M. and 5 A.M. when there is school for the youth the next day. This restriction does not apply to youths 16 and 17 years of age if the employer receives written approval for the youth to work beyond the stated hours from the youth's parent or guardian and from the youth's principal or the principal's designee.

(b) No youth under 18 years of age may be employed by an employer in any occupation which the United States Department of Labor shall find and by order declare to be hazardous and without exemption under the Fair Labor Standards Act, or in any occupation which the Commissioner of Labor after public hearing shall find and declare to be detrimental to the health and well-being of youths.

(c) No youth 14 or 15 years of age may be employed by an employer in any occupation except those determined by the United States Department of Labor to be permitted occupations under the Fair Labor Standards Act; provided, such youths may be employed by employers:

(1) No more than three hours on a day when school is in session for the youth;
(2) No more than eight hours on a day when school is not in session for the youth;
(3) Only between 7 A.M. and 7 P.M., except to 9 P.M. during the summer (when school is not in session);
(4) No more than 40 hours in any one week when school is not in session for the youth;
(5) No more than 18 hours in any one week when school is in session for the youth; and
(6) Only outside school hours.

Notwithstanding the above, enrollees in high school apprenticeships or in work experience and career exploration programs as defined under the Fair Labor Standards Act may work up to 23 hours in any one week when school is in session, any portion of which may be during school hours.

(d) No youth 13 years of age or less may be employed by an employer, except youths 12 and 13 years of age may be employed outside school hours in the distribution of newspapers to the consumer but not more than three hours per day. An employment certificate shall not be required for any youth under 18 years of age engaged in the distribution of newspapers to the consumer outside of school hours.

(e) No youth under 16 years of age shall be employed for more than five consecutive hours without an interval of at least 30 minutes for rest. No period of less than 30 minutes shall be deemed to interrupt a continuous period of work.

(f) For any youth 13 years of age or older, the Commissioner may waive any provision of this section and authorize the issuance of an employment certificate when:

(1) He receives a letter from a social worker, court, probation officer, county department of social services, a letter from the North Carolina Alcohol Beverage Control Commission or school official stating those factors which create a hardship situation and how the best interest of the youth is served by allowing a waiver; and

(2) He determines that the health or safety of the youth would not be adversely affected; and

(3) The parent, guardian, or other person standing in loco parentis consents in writing to the proposed employment.

(g) Youths employed as models, or as actors or performers in motion pictures or theatrical productions, or in radio or television productions are exempt from all provisions of this section except the certificate requirements of subsection (a).

(h) Youths employed by an outdoor drama directly in production-related positions such as stagehands, lighting, costumes, properties and special effects are exempt from all provisions of this section except the certificate requirements of subsection (a). Positions such as office workers, ticket takers, ushers and parking lot attendants have no exemption and are subject to all provisions of this section.

(i) Youths under 18 years of age employed by their parents are exempt from all provisions of this section, except for all of the following:

(1) The certificate requirements of subsection (a) of this section.

(2) The prohibition from hazardous or detrimental occupations of subsection (b) of this section.

(3) The prohibitions of subsection (j)(2) of this section if the youths only work at the establishment when another employee at least 21 years of age is in charge of and present at the licensed premises.

(j) No person who holds any ABC permit issued pursuant to the provisions of Chapter 18B of the General Statutes for the on-premises sale or consumption of alcoholic beverages, including any mixed beverages, shall employ a youth:

(1) Under 16 years of age on the premises for any purpose;

(2) Under 18 years of age to prepare, serve, dispense or sell any alcoholic beverages, including mixed beverages.

(k) Persons and establishments required to comply with or subject to regulation of child labor under the Fair Labor Standards Act are exempt from all provisions of this section, except the certificate requirements of subsection (a), the provisions of subsection (a1), the prohibition from occupations found and declared to be detrimental by the Commissioner of Labor pursuant to subsection (b), and the prohibitions of subsection (j). In addition, employment certificates will not be issued if such person's employment will be in violation of the applicable child labor provisions of the Fair Labor Standards Act. Such employers may also be assessed civil penalties pursuant to G.S. 95-25.23 for each violation of the provisions of this section or any regulation issued hereunder from which there is no exemption.

(*l*) Notwithstanding any other provision of this section, any youth who holds a North Carolina driver's license valid for the type of driving involved may be assigned as part of his employment to drive an automobile or truck not exceeding 6,000 pounds gross vehicle weight within a 25-mile radius of the principal place of employment, provided that the youth has completed a State-approved driver-education course, and provided that the assignment does not involve the towing of vehicles. "Gross vehicle weight" includes the truck chassis with lubricants, water and full tank or tanks of fuel, plus the weight of the cab or driver's compartment, body and special chassis and body equipment, and payload. (1937, c. 317, ss. 1-3, 6, 9, 18; 1943, c. 670; 1951, c. 1187, s. 1; 1967, cc. 173, 764; 1969, c. 962; 1973, c. 649, s. 1; c. 758, s. 1; 1977, c. 551, ss. 1-4; 1979, c. 839, s. 1; 1981, c. 412, ss. 3, 4; c. 489, ss. 1-7; c. 747, s. 66; 1985, c. 97, s. 1; 1987, c. 154; 1991, c. 492, s. 2; 1991 (Reg. Sess., 1992), c. 991, s. 1; 1993, c. 239, s. 1; 1995, c. 214, s. 1.)

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, in subsection (a), in the third sentence, moved the phrase "subject to review by the Department of Labor" from following "by county directors of social services" to preceding "by county directors of social services" and inserted "and such of their designees as are approved by the Commissioner" following "social services".

§ 95-25.7. Payment to separated employees.

CASE NOTES

Quoted in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.9. Certain claims not to be deducted immediately.

CASE NOTES

Stated in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 95-25.11. Employers' remedies preserved.

CASE NOTES

Stated in Clark v. B.H. Holland Co., 852 F. Supp. 1268 (E.D.N.C. 1994).

§ 95-25.12. Vacation pay.

CASE NOTES

Quoted in Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

§ 95-25.14. Exemptions.

(a) The provisions of G.S. 95-25.3 (Minimum Wage), G.S. 95-25.4 (Overtime), and G.S. 95-25.5 (Youth Employment), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:

(1) Any person employed in an enterprise engaged in commerce or in the production of goods for commerce as defined in the Fair Labor Standards Act:
   a. Except as otherwise specifically provided in G.S. 95-25.5;
   b. Notwithstanding the above, any employee other than a learner, apprentice, student, or handicapped worker as defined in the Fair Labor Standards Act who is not otherwise exempt under the other provisions of this section, and for whom the applicable minimum wage under the Fair Labor Standards Act is less than the minimum wage provided in G.S. 95-25.3, is not exempt from the provisions of G.S. 95-25.3 or G.S. 95-25.4;
   c. Notwithstanding the above, any employer or employee exempt from the minimum wage, overtime, or child labor requirements of the Fair Labor Standards Act for whom there is no comparable exemption under this Article shall not be exempt under this subsection except that where an exemption in the Fair Labor Standards Act provides a method of computing overtime which is an alternative to the method required in 29 U.S.C.S. § 207(a), the employer or employee subject to that alternate method shall be exempt from the provisions of G.S. 95-25.4(a); provided that, persons not employed at an enterprise described in subdivision (1) of this subsection shall also be subject to the same alternative methods of overtime calculation in the circumstances described in the Fair Labor Standards Act exemptions providing those alternative methods;

(2) Any person employed in agriculture, as defined under the Fair Labor Standards Act;

(3) Any person employed as a domestic, including baby sitters and companions, as defined under the Fair Labor Standards Act;

(4) Any person employed as a page in the North Carolina General Assembly or in the Governor's Office;
(5) Bona fide volunteers in medical, educational, religious, or nonprofit organizations where an employer-employee relationship does not exist;
(6) Persons confined in and working for any penal, correctional or mental institution of the State or local government;
(7) Any person employed as a model, or as an actor or performer in motion pictures or theatrical, radio or television productions, as defined under the Fair Labor Standards Act, except as otherwise specifically provided in G.S. 95-25.5;
(8) Any person employed by an outdoor drama in a production role, including lighting, costumes, properties and special effects, except as otherwise specifically provided in G.S. 95-25.5; but this exemption does not include such positions as office workers, ticket takers, ushers and parking lot attendants.

(b) The provisions of G.S. 95-25.3 (Minimum Wage) and G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to these exemptions, do not apply to:
(1) Any employee of a boys' or girls' summer camp or of a seasonal religious or nonprofit educational conference center;
(2) Any person employed in the catching, processing or first sale of seafood, as defined under the Fair Labor Standards Act;
(3) The spouse, child, or parent of the employer or any person qualifying as a dependent of the employer under the income tax laws of North Carolina;
(4) Any person employed in a bona fide executive, administrative, professional or outside sales capacity, as defined under the Fair Labor Standards Act;
(5) Repealed by Session Laws 1989, c. 687, s. 2, effective October 1, 1989.
(6) Any person while participating in a ridesharing arrangement as defined in G.S. 136-44.21.

(c) The provisions of G.S. 95-25.4 (Overtime), and the provisions of G.S. 95-25.15(b) (Record Keeping) as they relate to this exemption, do not apply to:
(1) Drivers, drivers' helpers, loaders and mechanics, as defined under the Fair Labor Standards Act;
(2) Taxicab drivers;
(3) Seamen, employees of railroads, and employees of air carriers, as defined under the Fair Labor Standards Act;
(4) Salespersons, mechanics and partsmen employed by automotive, truck, and farm implement dealers, as defined under the Fair Labor Standards Act;
(5) Salespersons employed by trailer, boat, and aircraft dealers, as defined under the Fair Labor Standards Act;
(6) Live-in child care workers or other live-in employees in homes for dependent children;
(7) Radio and television announcers, news editors, and chief engineers, as defined under the Fair Labor Standards Act.

(d) The provisions of this Article do not apply to the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, except for the following provisions, which do apply:

(1) The minimum wage provisions of G.S. 95-25.3;
(2) The definition provisions of G.S. 95-25.2 necessary to interpret the applicable provisions;
(3) The exemptions of subsections (a) and (b) of this section;
(4) The complainant protection provisions of G.S. 95-25.20.

(e) Employment in a seasonal recreation program by the State of North Carolina, any city, town, county, or municipality, or any State or local agency or instrumentality of government, is exempt from all provisions of this Article, including G.S. 95-25.3 (Minimum Wage). (1937, c. 406; c. 409, s. 3; 1939, c. 312, s. 1; 1943, c. 59; 1947, c. 825; 1949, c. 1057; 1959, cc. 475, 629; 1961, cc. 602, 1070; 1963, c. 1123; 1965, c. 724; 1967, c. 998; 1973, c. 600, s. 1; 1975, c. 19, s. 26; c. 413, s. 2; 1977, c. 146; 1979, c. 839, s. 1; 1981, c. 493, s. 2; c. 606, s. 2; c. 663, s. 7; 1983, c. 708, s. 2; 1989, c. 687, s. 2; 1991, c. 330, s. 3; 1993, c. 214, s. 2; 1995, c. 509, s. 47.)

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, substituted a semicolon for a period at the end of subdivision (a)(1)a.

§ 95-25.21. Illegal acts.

Editor's Note. — Session Laws 1993, c. 539, s. 661, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-25.22. Recovery of unpaid wages.

CASE NOTES

Accrual of Cause of Action. — As defendant's policy did not require it to pay cash for any unused vacation days until the employment was terminated, no individual plaintiff had a cause of action until the next pay day after termination; thus the trial court correctly found that only those plaintiffs whose pay date next following termination preceded two years prior to the filing of the action were barred by this section. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

Liquidated Damages Mandated. — Where defendant pointed to no evidence to show that the failure to pay plaintiffs for their vacation days was done in good faith or in the belief that it was not a violation of the Wage and Hour Act, this section mandated that the trial court award liquidated damages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

While this section states that interest may be recovered on the unpaid wages, it does not provide that interest is payable on liquidated damages. Hamilton v. Memorex Telex Corp., 118 N.C. App. 1, 454 S.E.2d 278 (1995).

ARTICLE 3.

Various Regulations.

§ 95-28. Working hours of employees in State institutions.

Editor's Note. — Session Laws 1993, c. 539, s. 662, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-28.2. Discrimination against persons for lawful use of lawful products during nonworking hours prohibited.

Legal Periodicals. — For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

ARTICLE 4.

Conciliation Service and Mediation of Labor Disputes.

§ 95-36. Powers and duties of Commissioner and conciliator.

Legal Periodicals. — For comment, "You Can't Always Get What You Want: A Look at North Carolina's Public Records Law," see 72 N.C.L. Rev. 1527 (1994).

ARTICLE 5A.

Regulation of Private Personnel Services.

§ 95-47.4. Contracts; contents; approval; tying contracts forbidden.

(a) A contract between a private personnel service and an applicant shall be in writing, labeled as a contract, physically separate from any application and made in duplicate. One copy shall be given to the applicant and the other shall be kept by the private personnel service as required by G.S. 95-47.5(2).

(b) Any contract that obligates an applicant to pay a fee to the private personnel service shall include:

(1) The name, address and telephone number of the private personnel service;
(2) The name of the applicant;
(3) The date the contract was signed;
(4) A clear schedule of the fees to be charged to the applicant at various salary levels;

(5) A clear explanation of when the applicant becomes obligated to pay a fee;

(6) A clear refund policy (or no refund policy) that conforms to the requirements of G.S. 95-47.4(f) and (g);

(7) If the applicant is obligated whether or not the applicant accepts employment, a clear explanation of the services provided and a statement that the private personnel service does not guarantee that the applicant will obtain employment as a result of its services;

(8) A statement, in a type size no smaller than nine point, directly above the place for the applicant's signature, that reads as follows: "I have read and received a copy of this CONTRACT, which I understand makes me legally obligated to pay a fee under conditions outlined above." In the preceding statement the word "CONTRACT" and no others shall be in all capitals; and

(9) A statement that the private personnel service is licensed and regulated by the Commissioner and the address at which a copy of laws and regulations governing private personnel services may be obtained.

(c) A copy of each contract form to be used with applicants shall be filed with the Commissioner. Until the private personnel service receives written notification from the Commissioner that the form conforms to the requirements of this Article and regulations adopted hereunder, it shall not be used with applicants.

(d) A private personnel service shall not require an applicant to sign a contract with the private personnel service before the applicant has had an opportunity to read the contract and discuss the contract with an employee of the personnel agency who regularly arranges contacts and assists in negotiations between employers and applicants. A private personnel service shall not coerce an applicant into signing a contract by applying or using duress, undue influence, fraud or misrepresentation sufficient to invalidate the contract under North Carolina law.

(e) Any contract that obligates an applicant to pay a fee to the private personnel service when the applicant accepts employment shall be physically separate from any contract that obligates an applicant to pay a fee whether or not the applicant accepts employment. A private personnel service shall not require an applicant to sign one contract as a prerequisite to signing another contract or to pay a fee as a prerequisite to signing a contract. Express violations of this subsection are the following:

(1) Refusal to allow an applicant to contract for counseling, job information or resume writing services, if the applicant does not agree to pay an additional fee upon acceptance of employment; and

(2) Refusal to allow an applicant to contract for services which obligate the applicant only upon acceptance of employment, if the applicant does not agree to pay a registration fee or to contract for counseling, resume writing or other services.

(f) If a private personnel service has a refund policy, included on each contract that obligates an applicant upon acceptance of employment will be a statement defining:

(1) The length of the period of time covered by the refund policy;

(2) The exact manner of computing the refund so that the amount of refund due the applicant will be clear;

(3) The conditions under which a refund becomes due to the applicant. The conditions of the refund, if other than unconditional policy is used, shall contain a definition of the reasons for which a refund will not be made. A refund will not be denied except for a reason so stated in the definition of the contract;

(4) A personnel service shall abide by the refund policy stated on its contract by promptly paying to applicants any refund due under the terms of the contract.

(g) If a private personnel service has no refund policy, the private personnel service shall include on each contract that obligates an applicant upon acceptance of employment, in a type size no smaller than nine point, a statement that reads as follows:

"................. (name of private personnel service) will make NO REFUND under any circumstances of fees paid by the applicant." In the preceding statement the words NO REFUND and no others shall be in all capitals.

(h) If a private personnel service places an applicant in a position of employment, the compensation of which is based, in whole or in part, on commission, the private personnel service shall:

(1) Have a written job order from the employer that includes the anticipated earnings upon which the private personnel service may base its fee, or

(2) In lieu of the written job order required by subdivision (1) of this subsection, have a policy of providing the same fee reimbursement as may be available to applicants from employers under the provisions of G.S. 95-47.3A.

In no case may the applicant collect the same reimbursement from both the employer and the private personnel service. When the private personnel service elects to obtain the written job order from the employer and not have its own reimbursement policy as described in subdivision (2) of this subsection, the private personnel service shall explain to the applicant and the employer how the fee for the placement is calculated, and shall inform in writing both the applicant and the employer of the provisions of G.S. 95-47.3A governing fee refunds from employers. (1979, c. 780, s. 1; 1991 (Reg. Sess., 1992), c. 970, s. 2; 1993, c. 202, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, which amended this section, in s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

§ 95-47.7. Private Personnel Service Advisory Council.

(a) There is hereby established the North Carolina Private Personnel Service Advisory Council. The Council shall be composed of 12 members appointed by the Commissioner. Each member of the Council shall be domiciled in this State for at least three years immediately preceding his appointment and be of good moral character. At least five members shall have occupied for at least three years immediately preceding their appointment, and shall occupy at the time of appointment, executive or managerial positions in the private personnel service industry in North Carolina;

and at least three shall have occupied, for at least three years immediately preceding their appointment, executive or managerial positions as personnel officers in companies which regularly utilize the services of private personnel services in obtaining employees. Members of the Council shall serve without salary, but shall be paid per diem, subsistence, and travel allowance in accordance with Chapter 138 of the General Statutes.

(b) Each member of the Council shall hold office until the appointment and qualification of his successor. The terms of the initial members of the Council shall expire as follows: four members, July 1, 1980; four members, July 1, 1981; four members, July 1, 1982. Subsequent appointments shall be made for terms of three years. Vacancies occurring in the membership of the Council for any cause shall be filled by appointment for the balance of the unexpired term. The Commissioner may remove any member of the Council for misconduct, incompetency, neglect of duty, or other good cause.

(c) The Council shall meet at least once in each calendar quarter of each year. All meetings of the Council shall be open and public and all records of the Council shall be open to inspection, except as otherwise prescribed by law. Seven members shall constitute a quorum for the transaction of business. The Council shall elect from its members, each for term of one year, a chairman and vice-chairman, and may appoint such committees as it deems necessary to carry out its duties. The Commissioner or his designee shall serve ex officio as the secretary of the Council, but shall not be a member of the Council. (1979, c. 780, s. 1; 1993 (Reg. Sess., 1994), c. 769, s. 29(b).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 769, which amended this section, in s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

§ 95-47.9. Enforcement of Article; rules; hearing; penalty; criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 663, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 6.

Separate Toilets for Sexes.

§§ 95-48 through 95-53: Repealed by Session Laws 1993, c. 204, s. 1, effective June 23, 1993.

Editor's Note. — Session Laws 1993, c. 204, s. 1 repealed this Article, effective June 23, 1993. Repealed G.S. 95-50 was also amended by Session Laws 1993, c. 539, s. 664, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), effective October 1, 1994. Because of the repeal of this section, the amendment is not set out.

ARTICLE 7A.

Uniform Boiler and Pressure Vessel Act.

§ 95-69.18. Inspection certificates required; misrepresentation as inspector.

Editor's Note. — Session Laws 1993, c. 539, s. 665, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 9.

Earnings of Employees in Interstate Commerce.

§ 95-75. Remedies for violation of § 95-73 or 95-74; damages; indictment.

Editor's Note. — Session Laws 1993, c. 539, s. 666, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 12.

Public Employees Prohibited from Becoming Members of Trade Unions or Labor Unions.

§ 95-98. Contracts between units of government and labor unions, trade unions or labor organizations concerning public employees declared to be illegal.

Legal Periodicals. —
For survey of developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

§ 95-99. Penalty for violation of Article.

Editor's Note. — Session Laws 1993, c. 539, s. 667, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 13.

Payments to or for Benefit of Labor Organizations.

§ 95-104. Penalty.

Editor's Note. — Session Laws 1993, c. 539, s. 668, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 14.

Inspection Service Fees.

§ 95-107. Assessment and collection of fees; certificates of safe operation.

The assessment of the fees pursuant to this Article shall be made against the owner or operator of such equipment and may be collected at the time of inspection. If the fees are not collected at the time of inspection, the Department must bill the owner or operator of the equipment for the amount of the fee assessed under this Article for the inspection of the equipment and the amount assessed is payable by the owner or operator of the equipment upon receipt of the bill. Certificates of safe operation may be withheld by the Department of Labor until such time as the assessed fees are collected. (1975, c. 777, s. 3; 1995, c. 217, s. 1.)

Effect of Amendments. — The 1995 amendment, effective June 12, 1995, substituted "may" for "shall" in the first and third sentences, and added the second sentence.

ARTICLE 14A.

Elevator Safety Act of North Carolina.

§ 95-110.5. Powers and duties of Commissioner.

The Commissioner of Labor is hereby empowered:

(1) To delegate to the Director of the Elevator and Amusement Device Division such powers, duties and responsibilities as the Commissioner determines will best serve the public interest in the safe operation of lifting devices and equipment;

(2) To supervise the Director of the Elevator and Amusement Device Division;

(3) To adopt, modify, or revoke such rules and regulations as are necessary for the purpose of carrying out the provisions of this Article including, but not limited to, those governing the design, construction, installation, plans review, testing, inspection, certification, operation, use, maintenance, alteration and relocation of devices and equipment subject to the

provisions of this Article. The rules and regulations promulgated pursuant to this rulemaking authority shall conform with good engineering practice as evidenced generally by the most recent editions of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks, the National Electrical Code, the American National Standard Safety Requirements for Personnel Hoists, the American National Standard Safety Code for Manlifts, the American National Standard Safety Standard for Conveyors and Related Equipment and similar codes promulgated by agencies engaged in research concerning strength of material, safe design, and other factors bearing upon the safe operation of the devices and equipment subject to the provisions of this Article. The rules and regulations may apply different standards to devices and equipment subject to this Article depending upon their date of installation. The rules and regulations for special equipment shall not adopt specifically any portion of the American National Standard Safety Code for Elevators, Dumbwaiters, Escalators and Moving Walks to inclined and vertical reciprocating conveyors;

(4) To enforce rules and regulations adopted under authority of this Article;

(5) To inspect and have tested for acceptance all new, altered or relocated devices or equipment subject to the provisions of this Article;

(6) To make maintenance and periodic inspections and tests of all devices and equipment subject to the provisions of this Article as often as every six months;

(7) To issue certificates of operation which certify for use such devices and equipment as are found to be in compliance with this Article and the rules and regulations promulgated thereunder;

(8) To have free access, with or without notice, to the devices and equipment subject to the provisions of this Article, during reasonable hours, for purposes of inspection or testing;

(9) To obtain an Administrative Search and Inspection Warrant in accordance with the provisions of Article 4A of Chapter 15 of the General Statutes;

(10) To investigate accidents involving the devices and equipment subject to the provisions of this Article to determine the cause of such accident, and he shall have full subpoena powers in conducting such investigation;

(11) To institute proceedings in the civil or criminal courts of this State, when a provision of this Article or the rules and regulations promulgated thereunder has been violated;

(12) To issue a limited certificate of operation for any device or equipment subject to the provisions of this Article to allow the temporary or restricted use thereof;

(13) To adopt, modify or revoke rules and regulations governing the qualifications of inspectors;

(14) To grant exceptions from the requirements of the rules and regulations promulgated under authority of this Article and to permit the use of other devices when such exceptions and uses will not expose the public to an unsafe condition likely to result in serious personal injury or property damage;

(15) To require that a construction permit must be obtained from the Commissioner before any device or equipment subject to the provisions of this Article is installed, altered or moved from one place to another and to require that the Commissioner must be supplied with whatever plans, diagrams or other data he deems necessary to determine whether or not the proposed construction is in compliance with the provisions of this Article and the rules and regulations promulgated thereunder;

(16) To prohibit the use of any device or equipment subject to the provisions of this Article which is found upon inspection to expose the public to an unsafe condition likely to cause personal injury or property damage. Such device or equipment shall be made operational only upon the Commissioner's determination that such device or equipment has been made safe;

(17) To order the payment of all civil penalties provided by this Article. Funds collected pursuant to a civil penalty order shall be deposited with the State Treasurer;

(18) To require that any device or equipment subject to the provisions of this Article which has been out-of-service and not continuously maintained for one or more years shall not be returned to service without first complying with all rules and regulations governing existing installations; and

(19) To coordinate enforcement and inspection activity relative to equipment, devices and operations covered by this Article in order to minimize duplication of liability or regulatory responsibility on the part of the employer or owner. (1985 (Reg. Sess., 1986), c. 990, s. 1; 1995, c. 217, s. 2.)

Effect of Amendments. — The 1995 amendment, effective June 12, 1995, substituted "existing installations" for "new installations" near the end of subdivision (18).

§ 95-110.11. Violations; criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 669, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 14B.

Amusement Device Safety Act of North Carolina.

§ 95-111.12. Liability insurance.

(a) **(Effective until December 31, 1997)** No owner shall operate a device subject to the provisions of this Article, unless at the time, there is in existence a contract of insurance providing coverage of not less than one million dollars ($1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of such device or there is in existence a contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the amusement devices if the annual gross volume of the devices does not exceed two hundred seventy-five thousand dollars ($275,000); provided waterslides shall not be required to be insured as provided in this subsection for an amount in excess of one hundred thousand dollars ($100,000) per occurrence. The insurance contract to be provided must be by any insurer or surety that is acceptable to the North Carolina Insurance Commissioner and authorized to transact business in this State; provided, however, that insurance for waterslides may be purchased under Article 21 of Chapter 58 of the General Statutes or under G.S. 58-28-5(b).

In lieu of a contract for insurance or surety, a waterslide owner may alternately comply with this subsection by furnishing to the Commissioner satisfactory proof of financial ability to directly pay one hundred thousand dollars ($100,000) per occurrence in liability for injury to persons or property arising out of the operation or use of the waterslide. The Commissioner may require the deposit of a security, indemnity, bond, or irrevocable letter of credit to secure the payment of any liability incurred. The Commissioner may consult with the Commissioner of Insurance, the Commissioner of Banks, the Secretary of Commerce, or the State Treasurer in order to determine if any security, indemnity, bond, or irrevocable letter of credit filed under this subsection is acceptable proof of financial responsibility.

(a) **(Effective December 31, 1997)** No owner shall operate a device subject to the provisions of this Article, unless at the time, there is in existence a contract of insurance providing coverage of not less than one million dollars ($1,000,000) per occurrence against liability for injury to persons or property arising out of the operation or use of such device or there is in existence a contract of insurance providing coverage of not less than five hundred thousand dollars ($500,000) per occurrence against liability for injury to persons or property arising out of the operation or use of the amusement devices if the annual gross volume of the devices does not exceed two hundred seventy-five thousand dollars ($275,000); provided waterslides shall not be required to be insured as herein provided for an amount in excess of one hundred thousand dollars ($100,000) per occurrence. The insurance contract to be provided must be by any insurer or surety that is acceptable to the North Carolina Insurance Commissioner and authorized to transact business in this State; provided, however, that insurance for waterslides may be purchased under Article 21 of Chapter 58 of the General Statutes or under G.S. 58-28-5(b).

(b) No certificate of operation shall be issued by the Commissioner until such time as the owner or his authorized agent provides proof of the required contract of insurance.

(c) The Commissioner shall have the right to request from the owner of a device regulated by this Article, or his authorized agent, proof of the required contract of insurance, and upon failure of the owner or his authorized agent to provide such proof, the Commissioner shall have the right to prevent the commencement of or to stop the operation of the device until such time as proof is provided.

(d) Operators of waterslides, as defined in G.S. 95-111.3(h), shall notify the Commissioner of all incidences of personal injury involving the waterslides, as required by G.S. 95-111.10(a). (1985 (Reg. Sess., 1986), c. 990, s. 2; 1987, c. 635, s. 1; c. 864, ss. 90(b), 91(a); 1989, c. 232; 1989 (Reg. Sess., 1990), c. 914; 1995, c. 517, s. 34.)

Subsection (a) Set Out Twice. — The first version of subsection (a) is effective until December 31, 1997. The second version of subsection (a) is effective December 31, 1997.

Editor's Note. —

Session Laws 1995, c. 517, s. 41, contains a severability clause.

Session Laws 1995, c. 517, s. 42, provides that subsection (a) as amended by s. 34 of that act expires December 31, 1997.

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, in subsection (a), substituted "provided in this subsection" for "herein provided" in the proviso at the end of the first sentence, and added the second paragraph. For expiration of this amendment, see the editor's note.

ARTICLE 15.

Passenger Tramway Safety.

§ 95-124. Suspension of registration.

Editor's Note. — Session Laws 1993, c. 539, s. 670, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 16.

Occupational Safety and Health Act of North Carolina.

§ 95-127. Definitions.

CASE NOTES

Quoted in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

Cited in Brooks v. Ansco & Assocs., 114 N.C. App. 711, 443 S.E.2d 89 (1994); Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 95-128. Coverage.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

CASE NOTES

Cited in Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

§ 95-130. Rights and duties of employees.

Legal Periodicals. — For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-131. Development and promulgation of standards; adoption of federal standards and regulations.

CASE NOTES

Cited in Sloan v. Miller Bldg. Corp., 119 N.C. App. 162, 458 S.E.2d 30 (1995).

§ 95-135. Safety and Health Review Board.

CASE NOTES

Cited in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-137. Issuance of citations.

CASE NOTES

Violations of Occupational Safety and Health Act. — The General Assembly determined that the State and its agencies can be issued citations for violations of the Occupational Safety and Health Act which are enforceable by proceedings before the Safety and Health Review Board. Brooks v. North Carolina DOT, 115 N.C. App. 163, 443 S.E.2d 897, cert. denied, 338 N.C. 308, 451 S.E.2d 632 (1994).

Cited in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-138. Civil penalties.

Editor's Note. — The word "provision" has been substituted for "provisions" in the next-to-last sentence of subsection (a) of this section, to correct a typographical error in the main volume. The word was enacted in its singular form.

§ 95-139. Criminal penalties.

Editor's Note. — Session Laws 1993, c. 539, s. 671, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-141. Judicial review.

CASE NOTES

Cited in Associated Mechanical Contractors v. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996).

§ 95-148. Safety and health programs of State agencies and local governments.

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

ARTICLE 18.

Identification of Toxic or Hazardous Substances.

Part 2. Public Safety and Emergency Response Right to Know.

§ 95-194. Emergency information.

Editor's Note. — Session Laws 1993, c. 539, s. 672, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 95-197. Withholding hazardous substance trade secret information.

Editor's Note. — Session Laws 1993, c. 539, s. 1290, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

ARTICLE 19.

Migrant Housing Act of North Carolina.

§§ 95-229.1 through 95-229.4: Reserved for future codification purposes.

ARTICLE 19A.

Overhead High-Voltage Line Safety Act.

§ 95-229.5. Purpose; scope.

The purpose of this Article is to promote the safety and protection of persons engaged in work in the vicinity of high-voltage overhead lines. This Article defines the conditions under which work may be carried on safely and provides for the precautionary safety arrangements to be taken when any person engages in work in proximity to overhead high-voltage lines. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

Editor's Note. — Session Laws 1995 (Reg. Sess., 1996), c. 587, s. 2, made this article effective October 1, 1996.

§ 95-229.6. Definitions.

As used in this Article, unless the context requires otherwise:

(1) "Covered equipment" or "covered items" means any mechanical equipment, hoisting equipment, antenna, or rigging; any part of which is capable of vertical, lateral, or swinging motion that could cause any portion of the equipment or item to come closer than 10 feet to a high-voltage line during erection, construction, operation, or maintenance; including, but not limited to, equipment such as cranes, derricks, power shovels, backhoes, dump trucks, drilling rigs, pile drivers, excavating equipment, hay-loaders, haystackers, combines, irrigation equipment, portable grain augers or elevators, and mechanical cotton pickers. These terms also include items such as handheld tools, ladders, scaffolds, antennas, and outriggers, houses or other structures in transport, and gutters, siding, and other construction materials, the motion or manipulation of which could cause them to come closer than 10 feet to a high-voltage line.

(2) "High-voltage line" means all aboveground electrical conductors of voltage in excess of 600 volts measured between conductor and ground.

(3) "Person" means natural person, firm, business association, company, partnership, corporation, or other legal entity.

(4) "Person responsible for the work to be done" means the person performing or controlling the job that necessitates the precautionary safety measures required by this Article.

(5) "Warning sign" means a weather-resistant sign of not less than five inches by seven inches with at least two panels: a signal panel and a message panel. The signal panel shall

contain the signal word "WARNING" in black lettering and a safety alert symbol consisting of a black triangle with an orange exclamation point, all on an orange background. The message panel shall contain the following words, either in black letters on a white background or white letters on a black background: "UNLAWFUL TO OPERATE THIS EQUIPMENT WITHIN TEN FEET OF OVERHEAD HIGH-VOLTAGE LINES — Contact with power lines can result in death or serious burns." A symbol or pictorial panel may also be added. Such warning sign language, lettering, style, colors, size, and format shall meet the requirements of the American National Standard ANSI Z535.4-1991, Product Safety Signs and Labels, or its successor or such equally effective standard as may be approved for use by the Commissioner of Labor. In the event of a conflict with regard to the appearance or content of the warning sign, the standard approved by the Commissioner of Labor shall take precedence over any description or standard set out in this subdivision. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.7. Prohibited activities.

(a) Unless danger of contact with high-voltage lines has been guarded against as provided by G.S. 95-229.8, 95-229.9, and 95-229.10, the following actions are prohibited:

(1) No person shall, individually or through an agent or employee, perform, or require any other person to perform, any work upon any land, building, highway, or other premises that will cause:
  a. Such individual, agent, employee, or other person to be placed within six feet of any overhead high-voltage line; or any part of any tool or material used by the agent, employee, or other person to be brought within six feet of any overhead high-voltage line, or
  b. Any part of any covered equipment or covered item used by the individual, agent, employee, or other person to be brought within 10 feet of any high-voltage line.

(2) No person shall, individually or through an agent or employee or as an agent or employee, erect, construct, operate, maintain, transport, or store any covered equipment or covered item within 10 feet of any high-voltage line, or such greater clearance as may be required under the circumstances by OSHA, except as provided herein. This prohibition shall not apply, however, to covered equipment as defined herein when lawfully driven or transported on public streets and highways in compliance with applicable height restrictions. The required clearance from high-voltage lines shall be not less than four feet when:
  a. Covered equipment as defined herein is lawfully driven or transported on public streets and highways in compliance with the height restriction applicable thereto,
  b. Refuse collection equipment is operating, or
  c. Agricultural equipment is operating.

(3) No person shall, individually or through an agent or employee or as an agent or employee, operate or cause to be

operated an airplane or helicopter within 20 feet of a high-voltage line, except that no clearance is specified for licensed aerial applicators that may incidentally pass within the 20-foot limitation during normal operation.

(4) No person shall, individually or through an agent or employee or as an agent or employee, store or cause to be stored any materials that are expected to be moved or handled by covered equipment or any covered item within 10 feet of a high-voltage line.

(5) No person shall, individually or through an agent or employee or as an agent or employee, provide or cause to be provided additional clearance by either (i) raising, moving, or displacing any overhead utility lines of any type or nature including high-voltage, low-voltage, telephone, cable television, fire alarm, or other lines or (ii) pulling or pushing any pole, guy, or other structural appurtenance.

(6) No person shall, individually or through an agent or employee or as an agent or employee, excavate or cause to be excavated any portion of any foundations of structures, including guy anchors or other structural appurtenances, which support any overhead utility lines of any type or nature, including high-voltage, low-voltage, telephone, cable television, fire alarm, or other lines.

(b) If the high-voltage line has been insulated or de- energized and grounded, in accordance with G.S. 95-229.10, the required clearances specified in subdivisions (1), (2), and (4) of subsection (a) of this section may be reduced to not less than two feet. Under no circumstances shall the line or its covering be contacted. If the line is temporarily raised or moved to accommodate the expected work, without also being insulated or de-energized and grounded, the required clearances from the line, specified in subsection (a) of this section, shall not be reduced. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.8. Warning signs.

(a) No person shall, individually or through an agent or employee or as an agent or employee, operate any covered equipment in the proximity of a high-voltage line unless warning signs are posted and maintained as follows:

(1) A sign shall be located within the equipment and readily visible and legible to the operator of such equipment when at the controls of such equipment; and

(2) Signs shall be located on the outside of equipment so as to be readily visible and legible at 12 feet to other persons engaged in the work operations.

This subsection shall not apply to handheld tools and handheld equipment which by their size or configuration cannot accommodate the warning signs specified in G.S. 95-229.6(5).

(b) If the Commissioner of Labor determines that a successor, substitute, or additional sign standard may or shall be used in place of the requirements listed in G.S. 95-229.6, a period of not less than 18 months from such determination shall be allowed for any required replacement of signs. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.9. Notification.

(a) When any person desires to carry on any work in closer proximity to any high-voltage line than permitted by G.S. 95-229.7(a), the person responsible for the work to be done shall notify the owner or operator of the high-voltage line prior to the time the work is to be commenced. Such notification shall occur at the earliest practical time; however, such notification shall occur not less than 48 hours, excluding Saturday, Sunday, and legal State and federal holidays, prior to the intended work. In emergency situations, including police, fire, and rescue emergencies, such notification shall occur as soon as possible under the circumstances. In cases where the person or business entity responsible for doing the work is doing so under contract or agreement with a government entity, and the government entity and the owner or operator of the lines have already made satisfactory mutual arrangements, further arrangements for that particular work are not required.

(b) Every notice served by any person on an owner or operator of a high-voltage line shall contain the following information:

(1) The name, address, and telephone number of the individual serving such notice;
(2) The location of the proposed work;
(3) The name, address, and telephone number of the person responsible for the work;
(4) The field telephone number of the site of such work, if one is available;
(5) The type, duration, and extent of the proposed work;
(6) The name of the person for whom the proposed work is being performed;
(7) The time and date of the notice; and
(8) The approximate date and time when the work is to begin.

(c) If the notification required by this Article is made by telephone, a record of the information in subsection (b) of this section shall be maintained by the owner or operator notified and the person giving the notice to document compliance with the requirements of this Article.

(d) Owners or operators of high-voltage lines may form and operate an association providing for mutual receipt of notification of activities close to high-voltage lines in a specified area. In areas where an association is formed, the following shall occur:

(1) Notification to the association shall be effected as set forth in this section.
(2) Owners or operators of high-voltage lines in the area:
  a. May become members of the association;
  b. May participate in and receive the services furnished by the association; and
  c. Shall pay their proportionate share of the cost for the services furnished.
(3) The association whose members or participants have high-voltage lines within a county shall file a list containing the name, address, and telephone number of every member and participating owner or operator of high-voltage lines with the clerk of superior court.
(4) If notification is made by telephone, an adequate record of the information required by subsection (b) of this section shall be maintained by the association to document compli-

ance with the requirements of this Article. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.10. Precautionary safety arrangements.

(a) Installation or performance of precautionary safety arrangements shall be performed by the owner or operator of high-voltage lines only after mutually satisfactory arrangements have been negotiated between the owner or the operator of the lines, or both, and the person responsible for the work to be done. The negotiations shall proceed promptly and in good faith with the goal of accommodating the requested work consistent with the owner's or operator's service needs and the intent to protect the public from the danger of contact with high-voltage lines as far as is reasonable and cost-effective. The person responsible for the work may perform the work only after satisfactory mutual arrangements, including coordination of work and construction schedules, have been made between the owner or operator of the high-voltage lines and the person responsible for the work. The owners or operators of high-voltage lines shall make the final determination as to which arrangements are most feasible and appropriate under the circumstances; provided, however, that the utility may determine that no arrangements can be made that would allow the proposed work to be carried out in a reasonably safe manner or at reasonable cost taking into account the cost to its customers, and the owner or operator of high-voltage lines may refuse to enter into an agreement on that basis.

(b) The precautionary safety measures shall be appropriate, reasonable, and cost-effective for the work of which the owner or operator of high-voltage lines has received notification. During mutual negotiations, the person responsible for the work may change the notification of intended work to include different or limited work so as to reduce the precautionary safety measures required to accommodate such work. The precautionary safety measures shall not violate the requirements of the current edition of the National Electrical Safety Code.

(c) The owner or operator of the high-voltage lines is not required to provide the precautionary safety arrangements until an agreement for payment has been made; except that, if the amount of payment is in dispute, the owner or operator shall commence with providing precautionary safety measures as if agreement had then been reached and the undisputed amount shall be paid according to the agreement reached as to that amount. If agreement for payment of the disputed amount has not been reached within 14 days from completion of precautionary safety measures, the owner or operator and the person or business entity responsible for doing the work may resolve the dispute by arbitration or other legal means.

(d) Unless otherwise agreed, the owner or operator of the high-voltage lines shall initiate the precautionary safety arrangements agreed upon within five working days after the agreement for payment has been reached as required in subsection (c) of this section, but no earlier than the agreed construction date coordinated between the parties. Once initiated, the owner or operator shall complete the work promptly and without interruption, consistent with the owner's or operator's service needs. Should the owner or operator of the high-voltage lines fail to provide the precautionary safety measures agreed upon in a timely manner, the owner or operator of the high-voltage lines shall be liable for costs or loss of production of the person or business entity requesting assistance to work in close proximity to high-voltage lines, except that no such liability shall exist during times of emergency, such as storm repair and the like.

(e) Precautionary safety arrangements may include:

(1) Placement of temporary mechanical barriers separating and preventing contact between material, equipment, other objects, or persons and high-voltage lines;
(2) Temporary de-energization and grounding;
(3) Temporary relocation or raising of the high-voltage lines; or
(4) Other such measures found to be appropriate in the judgment of the owner or operator of the high-voltage lines.

(f) The actual expense incurred by any owner or operator of high-voltage lines in taking precautionary measures as set out in subsections (a) through (e) of this section, including the wages of its workers involved in making safety arrangements, shall be paid by the person responsible for the work to be done, except if:

(1) Any owner or operator of an overhead high-voltage line has located its facilities within a public highway or street right-of-way and the work is performed by or for the Department of Transportation or a city, county, or town, the actual expenses shall be the responsibility of the owner or operator of the overhead high-voltage lines, unless the owner or operator can provide evidence of prior rights or there is a prior written agreement specifying cost responsibility. However, if it is determined by the Department of Transportation or a city, county, or town that the temporary safety arrangements are for the sole convenience of its contractor, the actual expense shall be the responsibility of the contractor;
(2) The owner or operator of the high-voltage lines has not installed the line in conformance with an applicable edition of the National Electrical Safety Code. In that case, the liability of the person responsible for the work shall be limited to the amount required to accommodate the work over and above the amount required to bring the installation into compliance with the National Electrical Safety Code; or
(3) In the case of property used for residential purposes, such actual expenses shall be limited to those in excess of one thousand dollars ($1,000). (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.11. Exemptions.

(a) This Article shall not apply to the construction, reconstruction, operation, and maintenance of overhead electrical or communication circuits or conductors and their supporting structures and associated equipment of the following systems, provided that such work on any of the following systems is performed by the employees of the owner or operator of the systems or independent contractors engaged on behalf of the owner or operator of the systems to perform the work, and the owner of the system has a valid joint-use contract or agreement with the owner of the high-voltage lines:

(1) Rail transportation systems;

(2) Electrical generating, transmission, or distribution systems;

(3) Communications systems, including cable television; or

(4) Any other publicly or privately owned system, including traffic signals.

(b) This Article also shall not apply to electrical or communications circuits or conductors on the premises of coal or other mines which are subject to the provisions of the Federal Mine Safety and Health Act of 1977 (30 U.S.C. § 801, et seq.) and regulations adopted pursuant to that Act by the Mine Safety and Health Administration. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.12. Application.

Nothing in this Article shall relieve any person from complying with any safety rule, regulation, or statute not imposed by this Article. A violation of this Article shall not constitute negligence or contributory negligence, nor give rise to any cause of action based upon injury to persons or property. An action may be brought by an owner or operator of a high-voltage line to recover the cost of precautionary safety arrangements or for damage to its facilities. Nothing contained in this Article shall be construed to alter, amend, restrict, or limit the liability of any person for violation of that person's duty under law; nor shall any person be relieved from liability as a result of violations of standards under existing law where such violations of existing standards of care are found to be a cause of damage to property, personal injury, or death. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

§ 95-229.13. Severability.

The provisions of this Article are severable. If any part of this Article is declared invalid or unconstitutional, such declaration shall not affect the remainder. (1995 (Reg. Sess., 1996), c. 587, s. 1.)

ARTICLE 20.

Controlled Substance Examination Regulation.

§ 95-232. Procedural requirements for the administration of controlled substance examinations.

(a) An examiner who requests or requires an examinee to submit to a controlled substance examination shall comply with the procedural requirements set forth in this section.

(b) Collection of samples: the collection of samples for examination or screening shall be performed under reasonable and sanitary conditions. Individual dignity shall be preserved to the extent practicable. Samples shall be collected in a manner reasonably calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples.

(c) Approved laboratories: the examiner shall have the option of:

(1) Performing the screening test on-site for prospective employees, provided that samples which demonstrate a posi-

tive drug test result are sent to an approved laboratory for confirmation, or

(2) Having an approved laboratory perform both the screening and confirmation tests as provided in this section.

(c1) Confirmation of samples: an approved laboratory shall confirm any sample that produces a positive result by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method.

(d) Retention of samples: a portion of every sample that produces a confirmed positive examination result shall be preserved by the laboratory that conducts the confirmatory examination for a period of at least 90 days from the time the results of the confirmed positive examination are mailed or otherwise delivered to the examiner.

(e) Chain of custody: the examiner or his agent shall establish procedures regarding chain of custody for sample collection and examination to ensure proper record keeping, handling, labeling, and identification of examination samples.

(f) Retesting of positive samples: the examinee shall have the right to retest a confirmed positive sample at the same or another approved laboratory. The examiner, through the approved laboratory, shall make confirmed positive samples available to the affected examinee, or a designated agent, during the time which the sample is required to be retained. The examinee must request release of the sample in writing specifying to which approved laboratory the sample is to be sent. The examinee incurs all reasonable expenses for chain of custody procedures, shipping, and retesting of positive samples related to this request. (1991, c. 687, s. 1; 1993, c. 213, s. 2; 1995, c. 383, s. 1.)

Effect of Amendments. — The 1995 amendment, effective July 6, 1995, in subsection (c) substituted "have the option of" for "use only approved laboratories for screening and confirmation of samples", and added subdivisions (c)(1) and (c)(2).

ARTICLE 21.

Retaliatory Employment Discrimination.

§ 95-240. Definitions.

Legal Periodicals. —
For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

§ 95-241. Discrimination prohibited.

CASE NOTES

Treatment of Similarly Situated Employees. — In an employee discharge case instituted pursuant to former § 97-6.1 (see now this section), evidence of the employer's treatment of similarly situated employees is admissible to show the employer's motive for discharging the employee. Abels v. Renfro Corp., 335 N.C. 209, 436 S.E.2d 822 (1993).

ARTICLE 22.

Safety and Health Programs and Committees.

§ 95-250. Definitions.

Legal Periodicals. — For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

Chapter 96.

Employment Security.

Article 1.

Employment Security Commission.

Sec.
96-3. Employment Security Commission.
96-5. Employment Security Administration Fund.

Article 2.

Unemployment Insurance Division.

Sec.
96-9. Contributions.
96-12. Benefits.

ARTICLE 1.

Employment Security Commission.

§ 96-3. Employment Security Commission.

(a) Organization. — There is hereby created a commission to be known as the Employment Security Commission of North Carolina. The Commission shall consist of seven members to be appointed by the Governor on or before July 1, 1941. The Governor shall have the power to designate the member of said Commission who shall act as the chairman thereof. The chairman of the Commission shall not engage in any other business, vocation or employment. Three members of the Commission shall be appointed by the Governor to serve for a term of two years. Three members shall be appointed to serve for a term of four years, and upon the expiration of the respective terms, the successors of said members shall be appointed for a term of four years each, thereafter, and the member of said Commission designated by the Governor as chairman shall serve at the pleasure of the Governor. Any member appointed to fill a vacancy occurring in any of the appointments made by the Governor prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term. The Governor may at any time after notice and hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

(b) Divisions. — The Commission shall establish two coordinate divisions: the North Carolina State Employment Service Division, created pursuant to G.S. 96-20, and the Unemployment Insurance Division. Each division shall be responsible for the discharge of its distinctive functions. Each division shall be a separate administrative unit with respect to personnel and duties, except insofar as the Commission may find that such separation is impracticable. Notwithstanding any other provision of this Chapter, administrative organization of the agency shall be in accordance with that which the Commission finds most desirable in order to perform the duties and functions of the agency.

(c) Salaries. — The chairman of the Employment Security Commission of North Carolina, appointed by the Governor, shall be paid from the Employment Security Administration Fund a salary payable on a monthly basis, which salary shall be fixed by the appointing officer in an amount no higher than the highest salary set by the General Assembly for an executive branch official; and the members of the Commission, other than the chairman, shall each receive the same amount per diem for their services as is provided for the members of other State boards, commissions, and committees who receive compensation for their services as such, including necessary time spent in traveling to and from his place of residence within the State to the place of meeting while engaged in the discharge of the duties of his office and his actual traveling expenses, the same to be paid from the aforesaid fund.

(d) Quorum. — The chairman or his designee and three members of the Commission shall constitute a quorum. (Ex. Sess. 1936, c. 1, s. 10; 1941, c. 108, s. 10; c. 279, ss. 1-3; 1943, c. 377, s. 15; 1947, c. 598, s. 1; 1953, c. 401, s. 1; 1957, c. 541, s. 5; 1965, c. 795, s. 1; 1977, c. 727, s. 7; 1979, c. 660, s. 1; 1981, c. 354; 1983, c. 717, s. 19; 1983 (Reg. Sess., 1984), c. 1034, s. 164; 1987, c. 103, s. 1; 1996, 2nd Ex. Sess., c. 18, s. 28.2(c).)

Editor's Note. — Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1996 Second Extra Session amendment, effective September 1, 1996, substituted "appointing officer in an amount no higher than the highest salary set by the General Assembly for an executive branch official" for "General Assembly in the Current Operations Appropriations Act" in subsection (c).

§ 96-4. Administration.

CASE NOTES

Employment Security Commission Testimony Held Privileged. — Plaintiff could not use Employment Security Commission testimony to offer limited support to her Title VII claim, and statutory privilege barred using the same testimony for the state claim. Hartsell v. Duplex Prods., Inc., 895 F. Supp. 100 (W.D.N.C. 1995).

§ 96-5. Employment Security Administration Fund.

(a) Special Fund. — There is hereby created in the State treasury a special fund to be known as the Employment Security Administration Fund. All moneys which are deposited or paid into this fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this Chapter, and shall not lapse at any time or be transferred to any other fund. The Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund which are received from the federal government or any agency thereof or which are appropriated by this State for the purpose described in G.S. 96-20 shall be expended solely for the purposes and in the amounts found necessary by the Secretary of Labor for the proper and efficient administration of this Chapter. The fund shall consist of all moneys appropriated by this State, all moneys received from the United States of America, or any agency thereof, including the Secretary of Labor, and all moneys received from any other source for such purpose, and shall also include any moneys received from any agency of the United States or any other state as compensation for services or facilities supplied to such agency, any amounts received pursuant to any surety bond or insurance policy or from other sources for losses sustained by the Employment Security Administration Fund or by reason of damage to equipment or supplies purchased from moneys in such fund, and any proceeds realized from the sale or disposition of any such equipment or supplies which may no longer be necessary for the proper administration of this Chapter: Provided, any interest collected on contributions and/or penalties collected pursuant to this Chapter shall be paid into the Special Employment Security Administration Fund created by subsection (c) of this section. All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Employment Security Administration Fund shall be deposited in said fund.

(b) Replacement of Funds Lost or Improperly Expended. — If any moneys received from the Secretary of Labor under Title III of the Social Security Act, or any unencumbered balances in the Employment Security Administration Fund or any moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, or any moneys made available by this State or its political subdivisions and matched by such moneys granted to this State pursuant to the provisions of the Wagner-Peyser Act, are found by the Secretary of Labor, because of any action or contingency, to have been lost or expended for purposes other than, or in amounts in excess of those found necessary by the Secretary of Labor for the proper administration of this Chapter, it is the policy of this State that such moneys, not available from the Special Employment Security Administration Fund established by subsection (c) of this section, shall be replaced by moneys appropriated for such purpose from the general funds of this State to the Employment Security Administration Fund for expenditure as provided in subsection (a) of this section. Upon receipt of notice of such a finding by the Secretary of Labor, the Commission shall promptly pay from the Special Employment Security Administration Fund such sum if available in such fund; if not available, it shall promptly report the amount required for such replacement to the Governor and the Governor shall, at the earliest opportunity, submit to the legislature a request for the appropriation of such amount.

(c) There is hereby created in the State treasury a special fund to be known as the Special Employment Security Administration Fund. All interest and penalties, regardless of when the same became payable, collected from employers under the provisions of this Chapter subsequent to June 30, 1947 as well as any appropriations of funds by the General Assembly, shall be paid into this fund.

No part of said fund shall be expended or available for expenditure in lieu of federal funds made available to the Commission for the administration of this Chapter. Said fund shall be used by the Commission for the payment of costs and charges of administration which are found by the Secretary of Labor not to be proper and valid charges payable out of any funds in the Employment Security Administration Fund received from any source and shall also be used by the Commission for: (i) extensions, repairs, enlargements and improvements to buildings, and the enhancement of the work environment in buildings used for Commission business; (ii) the acquisition of real estate, buildings and equipment required for the expeditious handling of Commission business; and (iii) the temporary stabilization of federal funds cash flow. The Employment Security Commission may use funds either from the Special Employment Security Commission Administration Fund created by this subsection or from federal funds, or from a combination of the two, to offset the costs of compliance with Article 7A [of Chapter 163] of the General Statutes of North Carolina or compliance with P.L. 103-31. Refunds of interest allowable under G.S. 96-10, subsection (e) shall be made from this special fund: Provided, such interest was deposited in said fund: Provided further, that in those cases where an employer takes credit for a previous overpayment of interest on contributions due by such employer pursuant to G.S. 96-10, subsection (e), that the amount of such credit taken for such overpayment of interest shall be reimbursed to the Unemployment Insurance Fund from the Special Employment Security Administration Fund. The Special Employment Security Administration Fund, except as otherwise provided in this Chapter, shall be subject to the provisions of the Executive Budget Act (G.S. 143-1 et seq.) and the Personnel Act (G.S. 126-1 et seq.). All moneys in this fund shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as is provided by law for other special funds in the State treasury, and shall be maintained in a separate account on the books of the State treasury. The State Treasurer shall be liable on his official bond for the faithful performance of his duties in connection with the Special Employment Security Administration Fund provided for under this Chapter. Such liability on the official bond shall be effective immediately upon the enactment of this provision, and such liability shall exist in addition to any liability upon any separate bond existent on the effective date of this provision, or which may be given in the future. All sums recovered on any surety bond for losses sustained by the Special Employment Security Administration Fund shall be deposited in said fund. The moneys in the Special Employment Security Administration Fund shall be continuously available to the Commission for expenditure in accordance with the provisions of this section.

(c1) The Employment Security Commission shall report to the Joint Legislative Commission on Governmental Operations and to the Fiscal Research Division no later than April 1 of every year as to how the funds authorized to be used by Session Laws 1995, (Regular Session, 1996), c. 608 were expended.

(d) The other provisions of this section and G.S. 96-6, to the contrary notwithstanding, the Commission is authorized to requisition and receive from its account in the unemployment trust fund in the treasury of the United States of America, in the manner permitted by federal law, such moneys standing to its credit in such fund, as are permitted by federal law to be used for expense of administering this Chapter and to expend such moneys for such purpose, without regard to a determination of necessity by a federal agency. The State Treasurer shall be treasurer and custodian of the amounts of money so requisitioned. Such moneys shall be deposited, administered, and disbursed in the same manner and under the same conditions and requirements as are provided by law for other special funds in the State treasury.

(e) Reed Bill Fund Authorization. — Subject to a specific appropriation by the General Assembly of North Carolina to the Employment Security Commission out of funds credited to and held in this State's account in the Unemployment Trust Fund by the Secretary of the Treasury of the United States pursuant to and in accordance with section 903 of the Social Security Act, the Commission is authorized to utilize such funds for the administration of the Employment Security Law, including personal services, operating and other expenses incurred in the administration of said law, as well as for the purchase or rental, either or both, of offices, lands, buildings or parts of buildings, fixtures, furnishings, equipment, supplies and the construction of buildings or parts of buildings, suitable for use in this State by the Employment Security Commission, and for the payment of expenses incurred for the construction, maintenance, improvements or repair of, or alterations to, such real or personal property. Provided, that any such funds appropriated by the General Assembly shall not exceed the amount in the Unemployment Trust Fund which may be obligated for expenditure for such purposes; and provided that said funds shall not be obligated for expenditure, as herein provided, after the close of the two-year period which begins on the effective date of the appropriation.

(f) Employment Security Commission Reserve Fund. — There is created in the State treasury a special trust fund, separate and apart from all other public moneys or funds of this State, to be known as the Employment Security Commission Reserve Fund, hereinafter "Reserve Fund". Part of the proceeds from the tax on contributions imposed in G.S. 96-9(b)(3)j shall be credited to the Reserve Fund, as specified in that statute. The moneys in the Reserve Fund may be used by the Commission for loans to the Unemployment Insurance Fund, as security for loans from the federal Unemployment Insurance Trust Fund, and to pay any interest required on advances under Title XII of the Social Security Act, and shall be continuously available to the Commission for expenditure in accordance with the provisions of this section. The State Treasurer shall be ex officio the treasurer and custodian and shall invest said moneys in accordance with existing law as well as rules and regulations promulgated pursuant thereto. Furthermore, the State Treasurer shall disburse the moneys in accordance with the directions of the Commission and in accordance with such regulations as the Commission may prescribe.

Administrative costs for the collection of the tax and interest payable to the Reserve Fund shall be borne by the Special Employment Security Administration Fund.

The interest earned from investment of the Reserve Fund moneys shall be deposited in a fund hereby established in the State Treasurer's Office, to be known as the "Worker Training Trust Fund". These moneys shall be used to:

(1) Fund programs, specifically for the benefit of unemployed workers or workers who have received notice of long-term layoff or permanent unemployment, which will enhance the employability of workers, including, but not limited to, adult basic education, adult high school or equivalency programs, occupational skills training programs, assessment, job counseling and placement programs;
(2) Continue operation of local Employment Security Commission offices throughout the State; or
(3) Provide refunds to employers.

The use of funds from the Worker Training Trust Fund, for the purposes set out in the above paragraph, shall be pursuant to appropriations in the Current Operations Appropriations Act. Funds appropriated from the Worker Training Trust Fund that are unexpended and unencumbered at the end of the fiscal year for which they are appropriated shall revert to the State treasury to the credit of the Worker Training Trust Fund in accordance with G.S. 143-18.

(g) Notwithstanding subsection (f) of this section, the State Treasurer may invest not more than a total of twenty-five million dollars ($25,000,000) of funds in the Employment Security Commission Reserve Fund established under subsection (f) of this section in securities issued by the North Carolina Technological Development Authority, Inc., the proceeds for which are directed to support investment in venture capital funds. The State Treasurer shall report to the Joint Legislative Commission on Governmental Operations and the Fiscal Research Division on October 1 and March 1 of each fiscal year on investments made pursuant to this subsection. (Ex. Sess. 1936, c. 1, s. 13; 1941, c. 108, ss. 12, 13; 1947, c. 326, s. 5; c. 598, s. 1; 1949, c. 424, s. 2; 1951, c. 332, s. 18; 1953, c. 401, ss. 1, 5; 1977, c. 727, ss. 11-13; 1981, c. 160, s. 2; 1987, c. 17, ss. 1, 2; 1991, c. 689, s. 142; 1991, Ex. Sess., c. 6, s. 1; 1995 (Reg. Sess., 1996), c. 608, s. 2; 1996, 2nd Ex. Sess., c. 18, s. 26.6.)

Editor's Note. —

Session Laws 1995 (Reg. Sess., 1996), c. 608, s. 3 was codified as subsection (c1) at the direction of the revisor of statutes.

Session Laws 1995 (Reg. Sess., 1996), c. 608, s. 4 provided in part that the Employment Security Commission shall report to the Election Law Reform Committee of the Legislative Research Commission by November 1, 1996, regarding how funds were expended, improvements in procedures for voter registration, and voter registration statistics in Employment Security Commission offices.

Session Laws 1995 (Reg. Sess., 1996), c. 18, s. 26.9 provides: "Notwithstanding G.S. 96-5(f), there is appropriated from the Worker Training Trust Fund to the following agencies the following sums for the 1996-97 fiscal year for the following purposes:

"(1) $218,500 to the Department of Commerce to be used for a computer system upgrade in the Division of Employment and Training in order to meet federal reporting requirements under the Job Training Partnership Act;

"(2) $210,000 to the Department of Labor for a computer upgrade in the apprenticeship tracking system in order to meet federal reporting requirements under the Federal Apprenticeship Program;

"(3) $90,000 to the Department of Labor to establish nationally certified dietary managers pilot projects. These projects will offer training programs to meet new federal regulations requiring a certified dietary manager on-site at every residential care facility in the State. Funds allocated under this subdivision may also be used to support other customized job training programs authorized by the Department; and

"(4) $100,000 to the Department of Community Colleges for a training program in entrepreneurial skills to be operated by North Carolina REAL Enterprises. Funds appropriated under this subdivision are in addition to those appropriated for the same purpose under Section 25.9(d)(6) of Chapter 507 of the 1995 Session Laws."

Session Laws 1996, Second Extra Session, c. 18, s. 1.1, provides: "This act shall be known as the Current Operations Appropriations Act of 1996."

Session Laws 1996, Second Extra Session, c. 18, s. 29.5, is a severability clause.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment by c. 608, s. 2, effective July 1, 1996, inserted the present fifth sentence of subsection (c).

The 1996 Second Extra Session amendment by c. 18, s. 26.6, effective July 1, 1996, added subsection (g).

ARTICLE 2.

Unemployment Insurance Division.

§ 96-8. Definitions.

CASE NOTES

II. "Employer".
III. "Employees".

II. "EMPLOYER".

ESC to Be Treated as Employer. — The reasoning of the Court of Appeals erroneously treated Employment Security Commission (ESC) as an agency appealing its own agency decision rather than as an "aggrieved party" where ESC appealed to Superior Court not as an agency decision-maker, but as an employer aggrieved by the agency action. ESC-employer was liable to pay for unemployment insurance benefits the same as any other employer and had the same rights of appeal as any other employer; thus, ESC-employer had the status of "aggrieved party" under ESC Regulation 21.18(D) and had appeal rights as such. Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

III. "EMPLOYEES".

Employee Status Versus Independent Contractor Status. — In determining whether someone is an independent contractor or an employee, the decisive test is the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses. State ex rel. Emp. Sec. Comm'n v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995), aff'd, 343 N.C. 297, 469 S.E.2d 552 (1996).

Truck Loaders. — Company maintained control over the manner and method of the truck loaders' work and the loaders did not retain that degree of independence necessary to require their classification as independent contractors where the loaders had no investment in the business, had to load the trucks at a particular plant within four set shifts under the direction and supervision of the plant, and the only discretion the loaders had was in choosing a load. State ex rel. Emp. Sec. Comm'n v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995), aff'd, 343 N.C. 297, 469 S.E.2d 552 (1996).

§ 96-9. Contributions.

(a) Payment. —

(1) Except as provided in subsection (d) hereof, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this Chapter, with

respect to wages for employment (as defined in G.S. 96-8(6)). Such contributions shall become due and be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ. Contributions shall become due on and shall be paid on or before the last day of the month following the close of the calendar quarter in which such wages are paid and such contributions shall be paid by each employer to the Commission for the fund in accordance with such regulations as the Commission may prescribe, and shall not be deducted in whole or in part from the remuneration of individuals in his employ, provided, further, that if the Commission shall be advised by its duly authorized officers or agents that the collection of any contribution under any provision of this Chapter will be jeopardized by delay, the Commission may, whether or not the time otherwise prescribed by law for making returns and paying such tax has expired, immediately assess such contributions (together with all interest and penalties, the assessment of which is provided for by law). Such contributions, penalties and interest shall thereupon become immediately due and payable, and immediate notice and demand shall be made by the Commission for the payment thereof. Upon failure or refusal to pay such contributions, penalties, and interest, it shall be lawful to make collection thereof as provided by G.S. 96-10 and subsections thereunder and such collection shall be lawful without regard to the due date of contributions herein prescribed, provided, further, that nothing in this paragraph shall be construed as permitting any refund of contributions heretofore paid under the law and regulations in effect at the time such contributions were paid.

(2) In the payment of any contributions a fractional part of a cent shall be disregarded unless it amounts to one-half cent or more, in which case it shall be increased to one cent.

(3) Benefits paid employees of this State shall be financed and administered in accordance with the provisions and conditions of G.S. 96-9(d) required for nonprofit organizations; except as provided by suitable regulations which may be adopted by the Commission. The Department of Administration shall make an election with respect to financing all such benefits.

(4) Political subdivisions of this State may finance benefits paid to employees either by coming under the experience rating program provided in G.S. 96-9(b) or by coming into the program on a reimbursement basis in accordance with the provisions and conditions of G.S. 96-9(f). Any election made shall be binding upon the political subdivision so electing for a period of four years.

(5) An employer is not required to pay contributions on wages the employer pays to an individual in a calendar year in excess of the taxable wage base for that calendar year. The taxable wage base is the greater of (i) the federally required taxable wage base or (ii) the product resulting from multiplying the average yearly insured wage by fifty percent

(50%), rounded to the nearest multiple of one hundred dollars ($100.00). The average yearly insured wage is the average weekly insured wage on the applicable computation date multiplied by 52. The following wages are included in determining whether the amount of wages paid to an individual in a single calendar year exceeds the taxable wage base:

a. Wages paid to an individual in this State by an employer that made contributions in another state upon the wages paid to the individual because the work was performed in the other state.

b. Wages paid by a successor employer to an individual that meets both of the following conditions: (i) the individual was an employee of the predecessor and was taken over as an employee by the successor as a part of the organization acquired and (ii) the predecessor employer has paid contributions on the wages paid to the individual while in the predecessor's employ during the year of acquisition and the account of the predecessor is transferred to the successor in accordance with G.S. 96-9(c)(4)a.

(6) If the amount of the contributions shown to be due after all credits is less than five dollars ($5.00), no payment need be made. If an employer has paid contributions, penalties, and/or interest in excess of the amount due, this shall be considered an overpayment and refunded provided no other debts are owed to the Commission by the employer. Overpayments of less than five dollars ($5.00) shall be refunded only upon receipt by the Chairman of a written demand for such refund from the employer. Nothing herein shall be construed to change or extend the limitation set forth in G.S. 96-10(e), (f), and (i).

(7) Effective with the quarter ending September 30, 1992, every employer with 250 or more employees, and every person or organization that, as agent, reports wages on a total of 250 or more employees on behalf of one or more subject employers, shall file that portion of the "Employer's Quarterly Tax and Wage Report" that contains the name, social security number, and gross wages of each individual in employment on magnetic tapes or diskettes in a format prescribed by the Commission.

For failure of an employer to comply with this subdivision, there shall be added to the amount required to be shown as tax in the reports a penalty of twenty-five dollars ($25.00). For failure of an agent to comply with this subdivision, the Commission may deny the agent the right to report wages and file reports for the employer for whom the agent filed an improper report for a period of one year following the calendar quarter in which that agent filed the improper report. The Commission may reduce or waive a penalty for good cause shown.

(8) An employer who has filed reports with the Commission for at least three consecutive years and has not been liable for quarterly contributions under subdivision (6) of this subsection during the preceding calendar year may be given permission by the Chair of the Commission to file reports

once a year on or before the last day of the month following the close of the calendar year in which the wages are paid. Permission to file a report annually may be revoked if the employer is found liable to the Commission for quarterly contributions under subdivision (6) of this subsection.

An employer who is granted permission to file annual reports must comply with 20 C.F.R. § 603.21 so that reporting of wages and employment status are as effective and timely as the quarterly wage reporting system. This compliance includes the reporting of all changes in employment status and in wages of an employee to the Commission within 14 days of the occurrence and responding to all inquiries from the Commission as to wages paid to an employee in a year in which the employer is reporting on an annual basis within 14 days of the postmark of the inquiry. If an employer does not report or respond to an inquiry within 14 days, then the Commission will estimate wages paid to an employee based on the last report the employer filed with the Commission, and the employer will be liable for any charge based on the Commission's estimation of the wages paid to the employee.

(9) Employers who are granted permission under subdivision (8) of this subsection to file annual reports may be given permission to file reports by telephone. Employers who report by telephone must contact either the Field Tax Auditor who is assigned to the employer's account or the Unemployment Insurance Division in Raleigh and report the required information to that Auditor or to the Division by the date the report is due under subdivision (8) of this subsection.

(b) Rate of Contributions. —

(1) Beginning Rate. — The standard beginning rate of contributions for an employer is a percentage of wages paid by the employer during a calendar year for employment occurring during that year. The rate is determined in accordance with the following table:

Percentage	Date After Which Employment Occurs
2.25%	December 31, 1986
1.8	December 31, 1993
1.2	December 31, 1995

(2) Experience Rating. —

a. Waiting Period for Rate Reduction. — No employer's contribution rate shall be reduced below the standard rate for any calendar year until its account has been chargeable with benefits for at least 12 calendar months ending July 31 immediately preceding the computation date.

b. Credit Ratio. — The Commission shall, for each year, compute a credit reserve ratio for each employer whose account has a credit balance. An employer's credit reserve ratio shall be the quotient obtained by dividing the credit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. Credit balance as used in this section means the total of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits to the account of the employer less the total benefits charged to the account of the employer for all past periods.

c. Debit Ratio. — The Commission shall for each year compute a debit ratio for each employer whose account shows that the total of all its contributions paid and credited for all past periods in accordance with G.S. 96-9(c)(1) together with all other lawful credits is less than the total benefits charged to its account for all past periods. An employer's debit ratio shall be the quotient obtained by dividing the debit balance of the employer's account as of July 31 of each year by the total taxable payroll of the employer for the 36 calendar-month period ending June 30 preceding the computation date. The amount arrived at by subtracting the total amount of all contributions paid and credited for all past periods in accordance with the provisions of G.S. 96-9(c)(1) together with all other lawful credits of the employer from the total amount of all benefits charged to the account of the employer for such periods is the employer's debit balance.

d. Other Provisions. — For purposes of this subsection, the first date on which an account shall be chargeable with benefits shall be the first date with respect to which a benefit year as defined in G.S. 96-8 can be established, based in whole or in part on wages paid by that employer.

No employer's contribution rate shall be reduced below the standard rate for any calendar year unless its liability extends over a period of all or part of two consecutive calendar years and, as of August 1 of the second year, its credit reserve ratio meets the requirements of that schedule used in computing rates for the following calendar year, unless the employer's liability was established under G.S. 96-8(5)b and its predecessor's account was transferred as provided by G.S. 96-9(c)(4)a.

Whenever contributions are erroneously paid into one account which should have been paid into another account or which should have been paid into a new account, that erroneous payment can be adjusted only by refunding the erroneously paid amounts to the paying entity. No pro rata adjustment to an existing account may be made, nor can a new account be created by transferring any portion of the erroneously paid amount, notwithstanding that the entities involved may be owned, operated, or controlled by the same person or organization. No adjustment of a contribution rate can be made reducing the rate below the standard rate for any period in which the account was not in actual existence and in which it was not actually chargeable for benefits. Whenever payments are found to have been made to the wrong account, refunds can be made to the entity making the wrongful payment for a period not exceeding five years from the last day of the calendar year in which it is determined that wrongful payments were made. Notwithstanding payment into the wrong account, if an entity is determined to have met the requirements to be a covered employer, whether or not the entity has had paid on the account of its employees any sum into another account, the Commission shall collect contributions at the standard rate or the assigned rate, whichever is higher, for the five years preceding the determination of erroneous payments, which five years shall run from the last day of the calendar year in which the determination of liability for contributions or additional contributions is made. This requirement applies regardless of whether the employer acted in good faith.

(3) a. through c. Repealed by Session Laws 1977, c. 727, s. 39.

d. Rate schedule A,B,C,D,E,F,G,H, or I appearing on the line opposite the fund ratio in the following Fund Ratio Schedules table shall be applicable in determining and assigning each eligible employer's contribution rate for the calendar year immediately following the computation date. The fund ratio is the total amount available for benefits in the Unemployment Insurance Fund on the computation date divided by the total amount of the taxable payroll of all subject employers for the 12-month period ending June 30 preceding the computation date.

FUND RATIO SCHEDULES

When the Fund Ratio Is: As Much As	But Less Than	Applicable Schedule
— —	2.0%	A
2.0%	3.0%	B
3.0%	4.0%	C
4.0%	5.0%	D
5.0%	6.0%	E
6.0%	7.0%	F
7.0%	8.0%	G
8.0%	9.0%	H
9.0% and in excess thereof		I

d1. Repealed by Session Laws 1994, Extra Session, c. 10, s. 3, effective January 1, 1997.

d2. **(Repealed effective January 1, 1998)** The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1994, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule.

§ 96-9(b)(3)d2. has a delayed repeal date. See note.

The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund equals or exceeds eight hundred million dollars ($800,000,000) on the computation date.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%) A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90
0.2%	0.4%	2.70	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70
0.4%	0.6%	2.70	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50
0.6%	0.8%	2.70	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30
0.8%	1.0%	2.70	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10
1.0%	1.2%	2.50	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90
1.2%	1.4%	2.30	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80
1.4%	1.6%	2.10	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70
1.6%	1.8%	1.90	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60
1.8%	2.0%	1.70	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50
2.0%	2.2%	1.50	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40
2.2%	2.4%	1.30	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30
2.4%	2.6%	1.10	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20
2.6%	2.8%	0.90	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15
2.8%	3.0%	0.80	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10
3.0%	3.2%	0.70	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09
3.2%	3.4%	0.60	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08
3.4%	3.6%	0.50	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07
3.6%	3.8%	0.40	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06
3.8%	4.0%	0.30	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05
4.0%	4.2%	0.20	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04
4.2%	4.4%	0.15	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03
4.4%	4.6%	0.10	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02
4.6%	4.8%	0.09	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01
4.8%	5.0%	0.08	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01
5.0%	5.2%	0.07	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01
5.2%	5.4%	0.06	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01
5.4%	5.6%	0.05	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01
5.6%	5.8%	0.04	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01
5.8%	6.0%	0.03	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.0%	6.2%	0.02	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01
6.2% & Over		0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01	0.01

d3. The standard contribution rate set by subdivision (b)(1) of this section applies to an employer unless the employer's account has a credit balance. Beginning January 1, 1995, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule. The contribution rate of an employer whose contribution rate is determined by this Experience Rating Formula table shall be reduced by fifty percent (50%) for any year in which the balance in the Unemployment Insurance Fund equals or exceeds eight hundred million dollars ($800,000,000) on the computation date and the fund ratio determined on that date is less than five percent (5%) and shall be reduced by sixty percent (60%) for any year in which the balance in the Unemployment Insurance Fund equals or exceeds eight hundred million dollars ($800,000,000) on the computation date, and the fund ratio determined on that date is five percent (5%) or more.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%
0.2%	0.4%	2.70%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%
0.4%	0.6%	2.70%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%
0.6%	0.8%	2.70%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%
0.8%	1.0%	2.50%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%
1.0%	1.2%	2.30%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%
1.2%	1.4%	2.10%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%
1.4%	1.6%	1.90%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%
1.6%	1.8%	1.70%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%
1.8%	2.0%	1.50%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%
2.0%	2.2%	1.30%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%
2.2%	2.4%	1.10%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%
2.4%	2.6%	0.90%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%
2.6%	2.8%	0.80%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%
2.8%	3.0%	0.70%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%
3.0%	3.2%	0.60%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%
3.2%	3.4%	0.50%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%
3.4%	3.6%	0.40%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%
3.6%	3.8%	0.30%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%
3.8%	4.0%	0.20%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%
4.0%	4.2%	0.15%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%	0.03%
4.2%	4.4%	0.10%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%	0.03%	0.02%
4.4%	4.6%	0.09%	0.08%	0.07%	0.06%	0.05%	0.04%	0.03%	0.02%	0.01%
4.6%	4.8%	0.08%	0.07%	0.06%	0.05%	0.04%	0.03%	0.02%	0.01%	0.01%

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
4.8%	5.0%	0.07%	0.06%	0.05%	0.04%	0.03%	0.02%	0.01%	0.01%	0.01%
5.0% & OVER		0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%	0.00%

d4. **(See editor's note for effective date)** The standard beginning contribution rate set by subdivision (1) of this subsection applies to an employer unless the employer's account has a credit balance or a debit balance. Notwithstanding the provisions of subdivision (3)d3. of this subsection, beginning January 1, 1996, and for the calendar year 1996 only, the contribution rate of an employer whose account has a credit balance is determined in accordance with the rate set in the following Experience Rating Formula table for the applicable rate schedule.

EXPERIENCE RATING FORMULA

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
0.0%	0.2%	2.70	2.70	2.70	0.00	0.00	0.00	0.00	0.00	0.00
0.2%	0.4%	2.70	2.70	2.70	0.00	0.00	0.00	0.00	0.00	0.00
0.4%	0.6%	2.70	2.70	2.50	0.00	0.00	0.00	0.00	0.00	0.00
0.6%	0.8%	2.70	2.50	2.30	0.00	0.00	0.00	0.00	0.00	0.00
0.8%	1.0%	2.50	2.30	2.10	0.00	0.00	0.00	0.00	0.00	0.00
1.0%	1.2%	2.30	2.10	1.90	0.00	0.00	0.00	0.00	0.00	0.00
1.2%	1.4%	2.10	1.90	1.70	0.00	0.00	0.00	0.00	0.00	0.00
1.4%	1.6%	1.90	1.70	1.50	0.00	0.00	0.00	0.00	0.00	0.00
1.6%	1.8%	1.70	1.50	1.30	0.00	0.00	0.00	0.00	0.00	0.00
1.8%	2.0%	1.50	1.30	1.10	0.00	0.00	0.00	0.00	0.00	0.00
2.0%	2.2%	1.30	1.10	0.90	0.00	0.00	0.00	0.00	0.00	0.00
2.2%	2.4%	1.10	0.90	0.80	0.00	0.00	0.00	0.00	0.00	0.00
2.4%	2.6%	0.90	0.80	0.70	0.00	0.00	0.00	0.00	0.00	0.00
2.6%	2.8%	0.80	0.70	0.60	0.00	0.00	0.00	0.00	0.00	0.00
2.8%	3.0%	0.70	0.60	0.50	0.00	0.00	0.00	0.00	0.00	0.00
3.0%	3.2%	0.60	0.50	0.40	0.00	0.00	0.00	0.00	0.00	0.00
3.2%	3.4%	0.50	0.40	0.30	0.00	0.00	0.00	0.00	0.00	0.00
3.4%	3.6%	0.40	0.30	0.20	0.00	0.00	0.00	0.00	0.00	0.00
3.6%	3.8%	0.30	0.20	0.15	0.00	0.00	0.00	0.00	0.00	0.00
3.8%	4.0%	0.20	0.15	0.10	0.00	0.00	0.00	0.00	0.00	0.00
4.0%	4.2%	0.15	0.10	0.09	0.00	0.00	0.00	0.00	0.00	0.00

When The Credit Ratio Is:

As Much As	But Less Than	Rate Schedules (%)								
		A	B	C	D	E	F	G	H	I
4.2%	4.4%	0.10	0.09	0.08	0.00	0.00	0.00	0.00	0.00	0.00
4.4%	4.6%	0.09	0.08	0.07	0.00	0.00	0.00	0.00	0.00	0.00
4.6%	4.8%	0.08	0.07	0.06	0.00	0.00	0.00	0.00	0.00	0.00
4.8%	5.0%	0.07	0.06	0.05	0.00	0.00	0.00	0.00	0.00	0.00
5.0%	OVER	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00

e. Each employer whose account as of any computation date occurring after August 1, 1964, shows a debit balance shall be assigned the rate of contributions appearing on the line opposite his debit ratio as set forth in the following Rate Schedule for Overdrawn Accounts:

RATE SCHEDULE FOR OVERDRAWN ACCOUNTS BEGINNING WITH THE CALENDAR YEAR 1978

When the Debit Ratio Is:

As Much As	But Less Than	Assigned Rate
0.0%	0.3%	2.9%
0.3	0.6	3.1
0.6	0.9	3.3
0.9	1.2	3.5
1.2	1.5	3.7
1.5	1.8	3.9
1.8	2.1	4.1
2.1	2.4	4.3
2.4	2.7	4.5
2.7	3.0	4.7
3.0	3.3	4.9
3.3	3.6	5.1
3.6	3.9	5.3
3.9	4.2	5.5
4.2 and over		5.7

The Rate Schedule for Overdrawn Accounts Beginning with the Calendar Year 1966 in force in any particular calendar year shall apply to all accounts for that calendar year subsequent replacement enactments notwithstanding.

f. The computation date for all contribution rates shall be August 1 of the calendar year preceding the calendar year with respect to which such rates are effective.

g. Any employer may at any time make a voluntary contribution, additional to the contributions required under this Chapter, to the fund to be credited to its account, and such voluntary contributions when made shall for all intents and purposes be deemed "contributions required" as this term is used in G.S. 96-8(8). Any voluntary contributions so made by an employer within 30 days after the date of mailing by the Commission pursuant to G.S. 96-9(c)(3) of notification of contribution rate contained in cumulative account statement and computation of rate, shall be credited to its account as of the previous July 31. If, however, the voluntary contribution is made after July 31 of any year it shall not be considered a part of the balance of the unemployment insurance fund for the purposes of G.S. 96-9(b)(3) until the following July 31. The Commission in accepting a voluntary contribution shall not be bound by any condition stipulated in or made a part of the voluntary contribution by the employer.

h. If, within the calendar month in which the computation date occurs, the Commission finds that any employing unit has failed to file any report required in connection therewith or has filed a report which the Commission finds incorrect or insufficient, the Commission shall make an estimate of the information required from such employing unit on the basis of the best evidence reasonably available to it at the time and shall notify the employing unit thereof by registered mail addressed to its last known address. Unless such employing unit shall file the report or a corrected or sufficient report, as the case may be, within 15 days after the mailing of such notice, the Commission shall compute such employing unit's rate of contributions on the basis of such estimates, and the rate as so determined shall be subject to increases but not to reduction, on the basis of subsequently ascertained information.

i. Repealed by Session Laws 1987, c. 17, s. 5.

j. A tax is imposed upon contributions at the rate of twenty percent (20%) of the amount of contributions due. The tax is due and payable at the time and in the same manner as the contributions. The tax does not apply in a calendar year if, as of August 1 of the preceding year, the amount in the Reserve Fund equals or exceeds one hundred sixty-three million three hundred forty-nine thousand dollars ($163,349,000), which is one percent (1%) of taxable wages for calendar year 1984. The collection of this tax, the assessment of interest and penalties on unpaid taxes, the filing of judgment liens, and the enforcement of the liens for unpaid taxes is governed by the provisions of G.S. 96-10 where applicable. Taxes collected under this subpart shall be credited to the Employment Security Commission Reserve Fund, and refunds of the taxes shall be paid from the same Fund. Any interest or penalties collected on unpaid taxes shall be credited to the Special Employment Security Administration Fund, and any interest or penalties refunded on taxes imposed by this subpart shall be paid from the same Fund.

(c)(1) Except as provided in subsection (d) of this section, the Commission shall maintain a separate account for each employer and shall credit his account with all voluntary contributions made by him and all other contributions which he has paid or is paid on his behalf, provided the Commission shall credit the account of each employer in an amount equal to eighty percent (80%) of all voluntary contributions paid with respect to periods prior to January 1, 1984, and of all other contributions paid with respect to periods between July 1, 1965, and December 31, 1983. On the computation date, beginning first with August 1, 1948, the ratio of the credit balance in each individual account to the total of all the credit balances in all employer accounts shall be computed as of such computation date, and an amount equal to the interest credited to this State's account in the unemployment trust fund in the treasury of the United States for the four most recently completed calendar quarters shall be credited prior to the next computation date on a pro rata basis to all employers' accounts having a credit balance on the computation date. Such amount shall be prorated to the individual accounts in the same ratio that the credit balance in each individual account bears to the total of the credit balances in all such accounts. In computing the amount to be credited to the account of an employer as a result of interest earned by funds on deposit in the unemployment trust fund in the treasury of the United States to the account of this State, any voluntary contributions made by an employer after July 31 of any year shall not be considered a part of the account balance of the employer until the next computation date occurring after such voluntary contribution was made. No provision in this section shall in any way be subject to or affected by any provisions of the Executive Budget Act, as amended. Nothing in this Act shall be construed to grant any employer or individual in his service prior claims or rights to the amount paid by him into the fund either on his own behalf or on behalf of such individuals.

(2) Charging of benefit payments. —

a. Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12(e)G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

b. Any benefits paid to any claimant under a claim filed for a period occurring after the date of such separations as are set forth in this paragraph and based on wages paid prior to the date of (i) the leaving of work by the claimant without good cause attributable to the employer; (ii) the discharge of claimant for misconduct in connection with his work; (iii) the discharge of the claimant for substantial fault as that term may be defined in G.S. 96-14; (iv) the discharge of the claimant solely for a bona fide inability to do the work for which he was hired but only where the claimant was hired pursuant to a job order placed with a local office of the Commission for referrals to probationary employment (with a probationary period no longer than 100 days), which job order was placed in such circumstances and which satisfies such conditions as the Commission may by regulation prescribe and only to the extent of the wages paid during such probationary employment; (v) separations made disqualifying under G.S. 96-14(2B) and (6A); or (vi) separation due to leaving for disability or health condition shall not be charged to the account of the employer by whom the claimant was employed at the time of such separation; provided, however, said employer promptly furnishes the Commission with such notices regarding any separation of the individual from work as are or may be required by the regulations of the Commission.

No benefit charges shall be made to the account of any employer who has furnished work to an individual who, because of the loss of employment with one or more other employers, becomes eligible for partial benefits while still being furnished work by such employer on substantially the same basis and substantially the same amount as had been made available to such individual during his base period whether the employments were simultaneous or successive; provided, that such employer makes a written request for noncharging of benefits in accordance with Commission regulations and procedures.

No benefit charges shall be made to the account of any employer for benefit years ending on or before June 30, 1992, where benefits were paid as a result of a discharge due directly to the reemployment of a veteran mandated by the Veteran's Reemployment Rights Law, 38 USCA § 2021, et seq.

No benefit charges shall be made to the account of any employer where benefits are paid as a result of a decision by an Adjudicator, Appeals Referee or the Commission if such decision to pay benefits is ultimately reversed; nor shall any such benefits paid be deemed to constitute an overpayment under G.S. 96-18(g)(2), the provisions thereof notwithstanding. Provided, an overpayment of benefits paid shall be established in order to provide for the waiting period required by G.S. 96-13(c).

c. Any benefits paid to any claimant who is attending a vocational school or training program as provided in G.S. 96-13(a)(3) shall not be charged to the account of the base period employer(s).

d. Any benefits paid to any claimant under the following conditions shall not be charged to the account of the base period employer(s):

1. The benefits are paid for unemployment due directly to a major natural disaster, and

2. The President has declared the disaster pursuant to the Disaster Relief Act of 1970, 42 USCA 4401, et seq., and
3. The benefits are paid to claimants who would have been eligible for disaster unemployment assistance under this Act, if they had not received unemployment insurance benefits with respect to that unemployment.

e. 1. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to the experience rating account of any employer.

2. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(3) As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each employer's account and shall furnish him with a statement of all charges and credits thereto. At the same time the Commission shall notify each employer of his rate of contributions as determined for the succeeding calendar year pursuant to this section. Such determination shall become final unless the employer files an application for review or redetermination prior to May 1 following the effective date of such rates. The Commission may redetermine on its own motion within the same period of time.

(4) Transfer of account. —

a. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account or that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision.

On or after August 1, 1988, whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires all of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, the account of the predecessor shall be transferred as of the date of the acquisition of the business to the successor employer for use in the determination of his rate of contributions. Whenever any individual, group of individuals, or employing unit, who or which, in any manner succeeds to or acquires a distinct and severable portion of the organization, trade, or business of another employing unit as provided in G.S. 96-8, subdivision (5), paragraph b, that part of the account of the predecessor which relates to the acquired portion of the business shall, upon the mutual consent of the parties concerned and approval of the Commission in conformity with the regulations as prescribed therefor, be transferred as of the date of acquisition of the business to the successor employer for use in the determination of his rate of contributions, provided application for transfer is made within 60 days after the Commission notifies the successor of his right to request such transfer, otherwise the effective date of the transfer shall be the first day of the calendar quarter in which such application is filed, and that after the transfer the successor employing unit continues to operate the transferred portion of such organization, trade or business. Provided, however, that the transfer of an account for the purpose of computation of rates shall be deemed to have been made prior to the computation date falling within the calendar year within which the effective date of such transfer occurs and the account shall thereafter be used in the computation of the rate of the successor employer for succeeding years, subject, however, to the provisions of paragraph b of this subdivision. No request for a transfer of the account will be accepted and no transfer of the account will be made if the request for the transfer of the account is not received within two years of the date of acquisition or notification by the Commission of the right to request such transfer, whichever occurs later. However, in no event will a request for a transfer be allowed if an account has been terminated because an employer ceases to be an employer pursuant to G.S. 96-9(c)(5) and G.S. 96-11(d) regardless of the date of notification.

b. Notwithstanding any other provisions of this section, if the successor employer was an employer subject to this Chapter prior to the date of acquisition of the business, his rate of contribution for the period from such date to the end of the then current contribution year shall be the same as his rate in effect on the date of such acquisition. If the successor was not an employer prior to the date of the acquisition of the business he shall be assigned a standard rate of contribution set forth in G.S. 96-9(b)(1) for the remainder of the year in which he acquired the business of the predecessor; however, if such successor makes application for the transfer of the account within 60 days after notification by the Commission of his right to do so and the account is transferred, or meets the requirements for mandatory transfer, he shall be assigned for the remainder of such year the rate applicable to the predecessor employer or employers on the date of acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessor were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of acquisition of the business.

Irrespective of any other provisions of this Chapter, when an account is transferred in its entirety by an employer to a successor, the transferring employer shall thereafter pay the standard rate of contributions of two and seven-tenths percent (2.7%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3). However, when an account is transferred in its entirety by an employer to a successor on or after January 1, 1987, the transferring employer shall thereafter pay the standard beginning rate of contributions of two and twenty-five hundredths percent (2.25%) and shall continue to pay at such rate until he qualifies for a reduction, reacquires the account he transferred or acquires the experience rating account of another employer, or is subject to an increase in rate under the conditions prescribed in G.S. 96-9(b)(2) and (3).

c. In those cases where the organization, trade, or business of a deceased person, or insolvent debtor is taken over and operated by an administrator, administratrix, executor, executrix, receiver, or trustee in bankruptcy, such employing units shall automatically succeed to the account and rate of contribution of such deceased person, or insolvent debtor without the necessity of the filing of a formal application for the transfer of such account.

(5) In the event any employer subject to this Chapter ceases to be such an employer, his account shall be closed and the same shall not be used in any future computation of such

employer's rate nor shall any period prior to the effective date of the termination of such employer during which benefits were chargeable be considered in the application of G.S. 96-9(b)(2) of this Chapter.

(6) If the Commission finds that an employer's business is closed solely because of the entrance of one or more of the owners, officers, partners, or the majority stockholder into the Armed Forces of the United States, or of any of its allies, or of the United Nations, such employer's experience rating account shall not be terminated; and, if the business is resumed within two years after the discharge or release from active duty in the Armed Forces of such person or persons, the employer's account shall be deemed to have been chargeable with benefits throughout more than 13 consecutive calendar months ending July 31 immediately preceding the computation date. This subdivision shall apply only to employers who are liable for contributions under the experience rating system of financing unemployment benefits. This subdivision shall not be construed to apply to employers who are liable for payments in lieu of contributions or to employers using the reimbursable method of financing benefit payments.

(d) Benefits paid to employees of nonprofit organizations shall be financed in accordance with the provisions of this paragraph. For the purposes of this paragraph, a nonprofit organization is an organization (or group of organizations) described in section 501(c)(3) of the United States Internal Revenue Code of 1954 which is exempt from income tax under section 501(a) of said Code.

(1)a. Any nonprofit organization which becomes subject to this Chapter on or after January 1, 1972, shall pay contributions under the provisions of this Chapter, unless it elects in accordance with this paragraph to pay the Commission for the Unemployment Insurance Fund an amount equal to the amount of regular benefits and of one half of the extended benefits paid, that is attributable to service in the employ of such nonprofit organization, to individuals for weeks of unemployment which begin within a benefit year established during the effective period of such election.

b. Any nonprofit organization which is or becomes subject to this Chapter on or after January 1, 1972, may elect to become liable for payments in lieu of contributions for a period of not less than four calendar years beginning with the date on which subjectivity begins by filing a written notice of its election with the Commission not later than 30 days immediately following the date of written notification of the determination of such subjectivity. Provided if notification is not by registered mail, the election may be made on or after January 1, 1972, within six months following the date of the written notification of the determination of such subjectivity. If such election is not made as set forth herein, no election can be made until after four calendar years have elapsed under the contributions method of payment.

c. Any nonprofit organization which makes an election in accordance with subparagraph b of this paragraph will continue after such four calendar years to be liable for payments in lieu of contributions until it files with the Commission a written notice terminating its election not later than 30 days prior to the next January 1, effective on such January 1.

d. Any nonprofit organization which has been paying contributions under this Chapter for a period of at least four consecutive calendar years subsequent to January 1, 1972, may elect to change to a reimbursement basis by filing with the Commission not later than 30 days prior to the next January 1 a written notice of election to become liable for payments in lieu of contributions, effective on such January 1. Such election shall not be terminable for a period of four calendar years. In the event of such an election, the account of such employer shall be closed and shall not be used in any future computation of such employer's contribution rate in any manner whatsoever. Provided, however, any nonprofit employer formerly paying contributions who elects and qualifies to change to a reimbursement basis may be relieved of the requirement to pay one percent (1%) of taxable wages as required by G.S. 96-9(d)(2)a to the following extent and upon the following conditions:

1. Any nonprofit employer which has, for the year the election will be effective, an experience rating of 1.7 or less, will have transferred from its experience rating account an amount equal to one percent (1%) of its payroll as reported for each of the four calendar quarters which constitute the election year;
2. Any nonprofit employer which has, for the year the election will be effective, an experience rating of less than 2.7 but more than 1.7, will have transferred from its experience rating account an amount equal to one-half of one percent (.5%) of its payroll as reported for each of the four calendar quarters which constitute the election year. Such employers shall make advance payments to the Commission quarterly, computed at one-half of one percent (.5%) of the taxable wages reported as provided in G.S. 96-9(d)(2)a;
3. Any nonprofit employer which has, for the year the election will become effective, an experience rating of 2.7 or more, upon electing to change to a reimbursement basis, will meet all the requirements of G.S. 96-9(d)(2)a, including making advance payments computed at one percent (1%) of taxable wages.

e. The Commission, in accordance with such regulations as it may adopt, shall notify each nonprofit organization of any determination which it may make of its status as an employer and of the effective date of any election which it makes and of any termination of such election. Such determinations shall be subject to reconsideration, appeal and review.

(2) Payments in lieu of contributions shall be made in accordance with the provisions of this subparagraph and shall be processed as provided herein.

a. Quarterly contributions and wage reports and advance payments shall be submitted to the Commission quarterly under the same conditions and requirements of G.S. 96-9 and 96-10, except that the amount of advance payments shall be computed as one percent (1%) of taxable wages and entered on such reports; provided that such advance payments shall become effective only with respect to the first four thousand two hundred dollars ($4,200) in wages paid in a calendar year until January 1, 1978. On and after that date advance payments shall be effective with respect to the federally required wage base provided that after December 31, 1983, the wage base shall be the same as that provided for in G.S. 96-9(a)(5). Collection of such advance payments shall be made as provided for the collection of contributions in G.S. 96-10.

   Beginning January 1, 1978, any employer making quarterly reports of employment to the Commission and if such employer is a newly electing reimbursement employer he shall pay contributions of one percent (1%) of taxable wages entered on such reports.

   Any employer paying by reimbursement having been, prior to July 1, under the reimbursement method of payment for the preceding calendar year, shall continue to file quarterly reports but shall make no payments with those reports.

b. The Commission shall establish a separate account for each such employer and such account shall be credited, and maintained as provided in G.S. 96-9(c)(1), except that advance payments shall be credited in full and voluntary contributions are not applicable.

c. Benefits paid shall be allocated to the employer's account in accordance with G.S. 96-9(c)(2)a but charged to such account without the application of any multiplier, and no benefits shall be noncharged except amounts equal to fifty percent (50%) of extended benefits paid and amounts equal to one hundred percent (100%) of benefits paid through error.

d. As of July 31 of each year, and prior to January 1 of the succeeding year, the Commission shall determine the balance of each such employer's account and shall furnish him with a statement of all charges and credits thereto.

   As of the second computation date (August 1) following the effective date of liability and as of each computation date thereafter, any credit balance remaining in the employer's account (after all applicable postings) in excess of whichever is the greater (a) benefits charged to such account during the 12 months ending on such computation date, or (b) one percent (1%) of taxable wages for the 12 months ending on June 30 preceding such computation date shall be refunded. Any such refund shall be made prior to February 1 following such computation date.

   Should the balance in such account not equal that requiring a refund, the employer shall upon notice and demand for payment mailed to his last known address pay into his account an amount that will bring such balance to the minimum required for a refund. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment. Any such amount unpaid on the due date shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Upon a change in election as to the method of payment from reimbursement to contributions, or upon termination of coverage and after all applicable benefits paid based on wages paid prior to such change in election or termination of coverage have been charged, any credit balance in such account shall be refunded to the employer.

Should there be a debit balance in such account, the employer shall, upon notice and demand for payment, mailed to his last-known address, pay into his account an amount equal to such debit balance. Such amount shall become due on or before the tenth day following the mailing of such notice and demand for payment.

Any such amount unpaid on the date due shall be collected in the same manner, including interest, as prescribed in G.S. 96-10.

Beginning January 1, 1978, each employer paying by reimbursement shall have his account computed on computation date (August 1) and if there is a deficit shall be billed for an amount necessary to bring his account to one percent (1%) of his taxable payroll. Any amount of his account in excess of that required to equal one percent (1%) of his payroll shall be refunded. Amounts due from any employer to bring his account to a one percent (1%) balance shall be billed as soon as practical and payment will be due within 25 days from the date of mailing of the statement of amount due.

e. The Commission may make necessary rules and regulations with respect to coverage of a group of nonprofit organizations and with respect to the reimbursement of benefits payments by such group of nonprofit organizations.

(3)a. Any benefits paid to any claimant which are based on previously uncovered employment which are reimbursable by the federal government shall not be charged to a nonprofit organization which makes payments to the State Unemployment Insurance Fund in lieu of contributions.

b. For purposes of this paragraph previously uncovered employment for which benefits are reimbursable by the federal government means services performed before July 1, 1978, in the case of a week of unemployment beginning before July 1, 1978, or before January 1, 1978, in the case of a week of unemployment beginning after July 1, 1978, and to the extent that assistance under Title II of the Emergency Jobs and Unemployment Assistance Act of 1974 (SUA) was not paid to such individuals on the basis of such service.

(e) In order that the Commission shall be kept informed at all times on the circumstances and conditions of unemployment within the State and as to whether the stability of the fund is being impaired under the operation and effect of the system provided in subsection (c) of this section, the actuarial study now in progress shall be continued and such other investigations and studies of a similar nature as the Commission may deem necessary shall be made.

(f)(1) On and after January 1, 1978, all benefits charged to a State or local governmental employing unit shall be paid to the Commission within 25 days from the date a list of benefit charges is mailed to the State or local governmental employing agency and the appropriate account(s) shall be credited with such payment(s).

(2) In lieu of paying for benefits by reimbursement as provided in subdivision (1) hereof, any State or local governmental employing unit may elect pursuant to rules and regulations established by the Commission:

a. To pay contributions on an experience rating basis as provided in G.S. 96-9(a), (b), and (c); or,

b. To pay to the Commission, within 25 days from the date a list of benefit charges is mailed to such employing unit, a sum equal to the amount which its account would be charged if it were a tax paying employer under G.S. 96-9(c)(2).

(3) State or local governmental employing units paying for benefits as provided in subdivision (1) herein may establish pool accounts; provided, that such pool accounts are established and maintained according to the rules and regulations of the Commission.

(4) Any governmental entity paying by reimbursement as provided in subdivision (1) hereof shall not have any benefits paid against its account noncharged or forgiven except as provided in G.S. 96-9(d)(2)c.

(g) Nothing contained in subsections (d) and (f) of this section shall be construed to prevent the Commission from providing any reimbursing employer with informational bills or lists of charges on a basis more frequent than yearly, if in its sole discretion, the Commission deems such action to be in the best interest of the Commission and the affected employer(s).

(h)(1) Any nonprofit organization which has been paying contributions on a reimbursement basis for at least three consecutive calendar years during none of which years the benefit charges exceeded four tenths of one percent (.4%) of its taxable payroll may, before November 1 of the fourth or subsequent calendar year, elect to pay contributions by special reimbursement on the basis provided for in subdivision (2) below but only upon the following conditions:

a. Benefit charges in the year of election are less than four tenths of one percent (.4%) of taxable payroll.

b. The election shall apply to no less than the four calendar years following the year of election unless terminated by the Commission under subdivision (3) below.

c. All reimbursements during the year of election and the three preceding years were paid when due.

d. The election of special reimbursement shall not entitle the electing nonprofit organization to any refund of any portion of its account balance.

e. No later than January 1 of the first year to which its election applies, the electing nonprofit organization shall furnish the Commission a letter of credit in an amount equal to one hundred fifty percent (150%) of the account balance required under subdivision (2) below.

f. The Commission shall by regulation prescribe the form of the letter of credit and the criteria for the financial institution issuing such letter of credit along with the form of election under this section.

(2) Any qualified nonprofit organization that meets the conditions of subdivision (1) above shall, upon the approval of its election by the Commission, pay contributions by special reimbursement as follows:

a. The organization's account shall have a required minimum balance that shall be computed on August 1 of each calendar year for the following calendar year and shall be equal to the greater of:

1. One-half the largest amount of claims charged to it during any of the three calendar years preceding the computation date; or,

2. One-tenth of one percent (0.1%) of the highest total taxable payroll during any of the three calendar years preceding the computation date.

b. On the first day of each quarter of any calendar year, the Commission shall bill the employer for an amount necessary to bring its account to the required minimum balance, and the amount so billed is due no later than 25 days after the bill is mailed.

(3) If any electing organization shall fail to make any quarterly payment when due:

a. The Commission may draw the full amount of the letter of credit for application to the employer's account;

b. The organization's required minimum balance shall immediately and without notice become the greater of:

1. A sum equal to its current minimum balance plus the full amount of the current letter of credit; or

2. A sum equal to five tenths of one percent (.5%) of its total taxable payroll. Any amount necessary, after the application of any funds drawn from the letter of credit, to bring the employer's account to such balance shall be payable upon demand.

c. If, after demand, the organization shall fail to pay any sums required under paragraph b. above, the Commission may revoke the organization's election for special reimbursement and any difference between the employer's account balance and one percent (1%) of its total taxable payroll shall become immediately due and payable.

d. The Commission may, in addition, exercise any of the powers granted to it in G.S. 96-10 to collect any amount due.

e. Pursuant to such regulations as the Commission may adopt, the Commission shall afford any organization affected by this paragraph a hearing to determine if any increase in the organization's minimum required balance should be reduced, in whole or in part, or if any revocation of a special reimbursement election should be rescinded. If the Commission, in its sole discretion, is satisfied that the conditions giving rise to the increase or revocation have been corrected, it may reduce such increase or rescind such revocation provided that it may require as a condition of such reduction or recision a new letter of credit up to three times the amount normally required.

f. When used in the subsection, "total taxable payroll" means the highest total taxable payroll during the three most recent, completed calendar years. (Sess. 1936, c. 1, s. 7; 1939, c. 27, s. 6; 1941, c. 108, ss. 6, 8; c. 320; 1943, c. 377, ss. 11-14; 1945, c. 522, ss. 11-16; 1947, c. 326, ss. 13-15, 17; c. 881, s. 3; 1949, c. 424, ss. 9-13; c. 969; 1951, c. 322, s. 2; c. 332, ss. 4-7; 1953, c. 401, ss. 12-14; 1955, c. 385, ss. 5, 6; 1957, c. 1059, ss. 5-11; 1959, c. 362, ss. 7, 8; 1965, c. 795, ss. 6-10; 1969, c. 575, ss. 7, 8; 1971, c. 673, ss. 14-20; 1973, c. 172, ss. 2, 3; c. 740, s. 1; 1977, c. 727, ss. 37-49; 1979, c. 660, ss. 13-15; 1981, c. 160, ss. 13-15; c. 534; 1983, c. 585, ss. 1-11; 1985, c. 552, ss. 5-7, 13; 1987, c. 17, ss. 3-7; c. 197; 1987 (Reg. Sess., 1988), c. 999, ss. 2, 3; 1989, c. 583, ss. 4, 6; c. 770, s. 20; 1991, c. 276, s. 1; c. 421, s. 1; c. 458, ss. 2, 3; 1991, Ex. Sess., c. 6, s. 2; 1993, c. 85, s. 1; c. 424, s. 1; 1994, Ex. Sess., c. 10, ss. 1-3; 1995, c. 4, ss. 1-3; c. 463, ss. 1-3; 1996, 1st Ex. Sess., c. 1.)

Editor's Note. —

Session Laws 1996, First Extra Session, c. 1, s. 5, provides that the Legislative Research Commission is authorized to study issues relating to the State's Employment Security Law, Chapter 96 of the General Statutes and the Commission is encouraged to appoint at least one member of the minority political party in each house to participate in the study. The Commission may make an interim report of its recommendations to the 1996 Regular Session of the 1995 General Assembly and shall make a final report to the 1997 General Assembly.

Session Laws 1996, First Extra Session, c. 1, s. 6 provides that s. 3(b), which repeals the last paragraph of subdivision (b)(3)g., is effective January 1, 1997; Session Laws 1996, Ex. Sess., c. 1, s. 6 further provides that s. 4, which adds subdivision (b)(3)d4., is effective with respect to calendar quarters beginning on or after January 1, 1996, and before January 1, 1997.

Effect of Amendments. — Session Laws 1996, First Extra Session, c. 1, ss. 1-3(a), effective February 21, 1996, in subdivision (b)(1) added the subcatchline and added the last line in the table; in subdivision (b)(2) added the subcatchline for subdivision (b)(2), (b)(2)a., (b)(2)b., (b)(2)c. and (b)(2)d., in subdivision (b)(2)a. substituted "until its" for "unless and until his", substituted "for at least 12" for "throughout more than 13 consecutive", and deleted "and his credit reserve ratio meets the requirements of that schedule used in the computation" from the end of the subdivision; in subdivision (b)(2)b. deleted "and has been chargeable with benefits as set forth in G.S. 96-9(b)(2)a of this Chapter" from the end of the first sentence; added the subdivision (b)(2)d. designation, in the first paragraph substituted "96-8" for "96-(17)", in the second paragraph substituted "two" for "three" and substituted "second" for "third"; and in the last paragraph rewrote the last sentence; in subdivision (b)(3)g. added the last paragraph; and made stylistic changes throughout the section.

Session Laws 1996, First Extra Session, c. 1, s. 3(b), effective January 1, 1997, repealed the third paragraph of subdivision (b)(3)g which read "An employer that has a debit ratio under G.S. 96-9(b)(2)c. as of January 1, 1996, may make an additional contribution pursuant to this subdivision during the 1996 calendar year. If this voluntary contribution is made within 30 days after the Commission furnishes the employer an account status notice, this voluntary contribution shall be credited to the employer's account as of July 31, 1995."

Session Laws 1996, First Extra Session, c. 1, s. 4, effective with respect to calendar quarters beginning on or after January 1, 1996, and before January 1, 1997, added subdivision (b)(3)d4.

§ 96-12. Benefits.

(a) Payment of Benefits. — Twenty-four months after the date when contributions first accrue under this Chapter benefits shall become payable from the fund. All benefits shall be paid through employment offices, in accordance with such regulations as the Commission may prescribe.

(b)(1)a. Repealed by Session Laws 1977, c. 727, s. 52.

b. An individual who is totally unemployed shall be paid the individual's weekly benefit amount. The weekly benefit amount for an individual is the amount of the high-quarter wages paid to the individual in the individual's base period, divided by 26 and, if the quotient is not a whole dollar, rounded to the next lower whole dollar. If this amount is less than fifteen dollars ($15.00), the individual is not eligible for benefits.

c. Repealed by Session Laws 1981, c. 160, s. 17.

(2) Each August 1, the Commission shall calculate the maximum weekly benefit amount available to an individual. The maximum weekly benefit amount is sixty-six and two-thirds percent (66 ⅔%) of the average weekly insured wage rounded, if the amount is not a whole dollar, to the next lower whole dollar. The maximum weekly benefit amount set on August 1 of a year applies to an individual whose benefit year begins on or after that date and before August 1 of the following year.

(3) Repealed by Session Laws 1981, c. 160, s. 18.

(4) Qualifying Wages for Second Benefit Year. — An individual whose prior benefit year has expired and who files a new benefit claim is not entitled to benefits unless the individual has been paid qualifying wages since the beginning date of the prior benefit year and before the date the new benefit claim was filed equal to at least 10 times the individual's weekly benefit amount under the new benefit claim. "Qualifying wages" are wages earned with an employer subject to the provisions of this Chapter or some other state employment security law or in federal service as defined in 5 U.S.C. Chapter 85.

(c) Partial Weekly Benefit. — An individual who is partially unemployed or part-totally employed shall be paid a portion of the individual's weekly benefit amount. The portion payable is the difference between the individual's weekly benefit amount and any part of the wages or remuneration that is payable to the individual for a week for which benefits are claimed and that exceeds ten percent (10%) of the individual's average weekly wage in the highest quarter of the individual's base period rounded, if the amount is not a whole dollar, to the next lower whole dollar. Payments received by an individual under a supplemental benefit plan referred to in G.S. 96-8(13)d. do not affect the computation of the individual's partial weekly benefit.

(d) Duration of Benefits. — The total benefits paid to an individual shall not be less than the minimum total benefit and shall not exceed the lesser of the maximum total benefit or the individual's total benefit amount. The total benefit amount for an individual is determined by dividing the individual's base-period wages by the individual's high-quarter wages, multiplying that quotient by eight and two thirds, rounding the result to the nearest whole number, and then multiplying the resulting amount by the individual's weekly benefit amount. The minimum total benefit for an individual is 13 times the individual's weekly benefit amount. The maximum total benefit for an individual is 26 times the individual's weekly benefit amount, unless the benefits are extended further in accordance with subsection (e) of this section. The Commission shall establish and maintain individual wage record accounts for each individual who earns wages in covered employment for as long as the wages would be included in a determination of benefits.

(e) Extended Benefits. — Effective January 1, 1972, extended benefits shall be paid under this Chapter as herein specified:

A. Definitions. — As used in this subsection, unless the context clearly requires otherwise —

(1) "Extended benefit period" means a period which:

(a) Begins the third week after a week for which there is an "on" indicator; and

(b) Ends with either of the following weeks, whichever occurs later:

(I) The third week after the first week for which there is an "off" indicator; or

(II) The 13th consecutive week of such period.

Provided, that no extended benefit period may begin before the 14th week following the end of a prior extended benefit period which was in effect with respect to this State.

(2) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1178, s. 4.

(3) Repealed by Session Laws 1982 (Regular Session, 1982), c. 1178, s. 5.

(4) There is an "on indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediate preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Equalled or exceeded one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and equalled or exceeded five percent (5%), or

b. Equalled or exceeded six percent (6%).

(5) There is an "off indicator" for this State for a week if the Commission determines, in accordance with the regulations of the United States Secretary of Labor, that for the period consisting of such week and the immediately preceding 12 weeks, the rate of insured unemployment (not seasonally adjusted) under this Chapter:

a. Was less than one hundred twenty percent (120%) of the average of such rates for the corresponding 13-week period ending in each of the preceding two calendar years, and was less than six percent (6%), or

b. Was less than five percent (5%).

(6) "Rate of insured unemployment," for the purposes of subparagraphs (4) and (5) of this subsection, means the percentage derived by dividing

a. The average weekly number of individuals filing claims for regular compensation in this State for weeks of unemployment with respect to the most recent 13 consecutive-week period, as determined by the Commission on the basis of its reports to the United States Secretary of Labor, by

b. The average monthly employment covered under this Chapter for the first four of the most recent six completed calendar quarters ending before the end of such 13-week period.

(7) "Regular benefits" means benefits payable to an individual under this Chapter or any other State law (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) other than extended benefits.

(8) "Extended benefits" means benefits (including benefits payable to federal civilian employees and to ex-servicemen pursuant to 5 U.S.C. Chapter 85) payable to an individual under the provisions of this section for weeks of unemployment in his eligibility period.

(9) "Eligibility period" of an individual means the period consisting of the weeks in his benefit year which begin in an extended benefit period and if his benefit year ends within such extended benefit period, any weeks thereafter which begin in such period.

(10) "Exhaustee" means an individual who, with respect to any week of unemployment in his eligibility period:

a. Has received, prior to such week, all of the regular benefits that were available to him under this Chapter or any other State law (including dependents' allowances and benefits payable to federal civilian employees and ex-servicemen under 5 U.S.C. Chapter 85) in his current benefit year that includes such week;

Provided, that, for the purposes of this subparagraph, an individual shall be deemed to have received all of the regular benefits that were available to him although (1) as a result of a pending appeal with respect to wages that were not considered in the original monetary determination in his benefit year, he may subsequently be determined to be entitled to added regular benefits, or (2) he may be entitled to regular benefits with respect to future weeks of unemployment, but such benefits are not payable with respect to such week of unemployment by reason of the provisions in G.S. 96-16; or

b. His benefit year having expired prior to such week, has no, or insufficient, wages on the basis of which he could establish a new benefit year that would include such week; and c.(1) Has no right to unemployment benefits or allowances, as the case may be, under the Railroad Unemployment Insurance Act, the Trade Expansion Act of 1962, the Automotive Products Trade Act of 1965 and such other federal laws as are specified in regulations issued by the United States Secretary of Labor; and

(2) Has not received and is not seeking unemployment benefits under the unemployment compensation law of Canada; but if he is seeking such benefits and the appropriate agency finally determines that he is not entitled to benefits under such law, he is considered an exhaustee.

(11) "State law" means the unemployment insurance law of any state approved by the United States Secretary of Labor under section 3304 of the Internal Revenue Code of 1954.

B. Effect of State Law Provisions Relating to Regular Benefits on Claims for, and for Payment of, Extended Benefits. — Except when the result would be inconsistent with the other provisions of this section, as provided in the regulations of the Commission, the provisions of this Chapter which apply to claims for, or the payment of, regular benefits shall apply to claims for, and the payment of, extended benefits.

C. Eligibility Requirements for Extended Benefits. — An individual shall be eligible to receive extended benefits with respect to any week of unemployment in his eligibility period only if the Commission finds that with respect to such week:

1. He is an "exhaustee" as defined in subsection A(10).
2. He has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, however, that for purposes of disqualification for extended benefits for weeks of unemployment beginning after March 31, 1981, the term "suitable work" means any work which is within the individual's capabilities to perform if: (i) The gross average weekly remuneration payable for the work exceeds the sum of the individual's weekly extended benefit amount plus the amount, if any, of supplemental unemployment benefits (as defined in section 501(C)(17)(D) of the Internal Revenue Code of 1954) payable to such individual for such week; and (ii) the gross wages payable for the work equal the higher of the minimum wages provided by section 6(a)(1) of the Fair Labor Standards Act of 1938 as amended (without regard to any exemption), or the State minimum wage; and (iii) the work is offered to the individual in writing and is listed with the State employment service; and (iv) the considerations contained in G.S. 96-14(3) for determining whether or not work is suitable are applied to the extent that they are not inconsistent with the specific

requirements of this subdivision; and (v) the individual cannot furnish evidence satisfactory to the Commission that his prospects for obtaining work in his customary occupation within a reasonably short period of time are good, but if the individual submits evidence which the Commission deems satisfactory for this purpose, the determination of whether or not work is suitable with respect to such individual shall be made in accordance with G.S. 96-14(3) without regard to the definition contained in this subdivision. Provided, further, that no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions set forth in this subdivision, but the employment service shall refer any individual claiming extended benefits to any work which is deemed suitable hereunder. Provided, further, that any individual who has been disqualified for voluntarily leaving employment, being discharged for misconduct or substantial fault, or refusing suitable work under G.S. 96-14 and who has had the disqualification terminated, shall have such disqualification reinstated when claiming extended benefits unless the termination of the disqualification was based upon employment subsequent to the date of the disqualification.

3. After March 31, 1981, he has not failed either to apply for or to accept an offer of suitable work, as defined in G.S. 96-12(e)C.2., to which he was referred by an employment office of the Commission, and he has furnished the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work. If an individual is found to be ineligible hereunder, he shall be ineligible beginning with the week in which he either failed to apply for or to accept the offer of suitable work or failed to furnish the Commission with tangible evidence that he has actively engaged in a systematic and sustained effort to find work and such individual shall continue to be ineligible for extended benefits until he has been employed in each of four subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than four times his weekly benefit amount.
4. Pursuant to section 202(a)(7) of the Federal-State Extended Unemployment Compensation Act of 1970 (P.L. 91-373), as amended by section 202(b)(1) of the Unemployment Compensation Amendments of 1992 (Public Law 102-318), for any week of unemployment beginning after March 6, 1993, and before January 1, 1995, the individual is an exhaustee as defined by federal law and has satisfied the requirements of this Chapter for the receipt of regular benefits that are applicable to individuals claiming extended benefits, including not being subject to a disqualification for the receipt of benefits. Provided, the terms and conditions of State law that apply to claims for regular compensation and to the payment thereof shall apply to claims for extended benefits and to the payment thereof.

D. Weekly Extended Benefit Amount. — The weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be an amount equal to the weekly benefit amount payable to him during his applicable benefit year. For any individual who was paid benefits during the applicable benefit year in accordance with more than one weekly benefit amount, the weekly extended benefit amount shall be the average of such weekly benefit amounts rounded to the nearest lower full dollar amount (if not a full dollar amount). Provided, that for any week during a period in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the weekly extended benefit amount payable to an individual for a week of total unemployment in his eligibility period shall be reduced by a percentage equivalent to the percentage of the reduction in the federal payment. The reduced weekly extended benefit amount, if not a full dollar amount, shall be rounded to the nearest lower full dollar amount.

E. (a) Total Extended Benefit Amount. — Except as provided in subparagraph (b) hereof, the total extended benefit amount payable to any eligible individual with respect to his applicable benefit year shall be the least of the following amounts:

1. Fifty percent (50%) of the total amount of regular benefits which were payable to him under this Chapter in his applicable benefit year; or
2. Thirteen times his weekly benefit amount which was payable to him under this Chapter for a week of total unemployment in the applicable benefit year.

Provided, that during any fiscal year in which federal payments to states under Section 204 of the Federal-State Extended Unemployment Compensation Act of 1970, P.L. 91-373, are reduced under an order issued under Section 252 of the Balanced Budget and Emergency Deficit Control Act of 1985, P.L. 99-177, the total extended benefit amount payable to an individual with respect to his applicable benefit year shall be reduced by an amount equal to the aggregate of the reductions under G.S. 96-12(e)D and the weekly amounts paid to the individual.

(b) Notwithstanding any other provisions of this Chapter, if the benefit year of any individual ends within an extended benefit period, the remaining balance of extended benefits that such individual would, but for this subparagraph, be entitled to receive in that extended benefit period, with respect to weeks of unemployment beginning after the end of the benefit year, shall be reduced (but not below zero) by the product of the number of weeks for which the individual received any amounts as trade readjustment allowances within that benefit year, multiplied by the individual's weekly benefit amount for extended benefits.

F. Beginning and Termination of Extended Benefit Period. —

1. Whenever an extended benefit period is to become effective in this State as a result of an "on" indicator, or an extended benefit period is to be terminated in this State as a result of an "off" indicator, the Commission shall make an appropriate public announcement; and
2. Computations required by the provisions of subsection A(6) shall be made by the Commission, in accordance with regulations prescribed by the United States Secretary of Labor.

G. Prior to January 1, 1978, any extended benefits paid to any claimant under G.S. 96-12(e) shall not be charged to the account of the base period employer(s) who pay taxes as required by this Chapter. However, fifty percent (50%) of any such benefits paid shall be allocated as provided in G.S. 96-9(c)(2)a (except that G.S. 96-9(c)(2)b shall not apply), and the applicable amount shall be charged to the account of the appropriate employer paying on a reimbursement basis in lieu of taxes.

On and after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers.

H. Notwithstanding the provisions of G.S. 96-9(d)(1)a, 96-9(d)(2)c, 96-12(e)G, or any other provision of this Chapter, any extended benefits paid which are one hundred percent (100%) federally financed shall not be charged in any percentage to any employer's account.

I. For weeks of unemployment beginning on or after June 1, 1981, a claimant who is filing an interstate claim under the interstate benefit payment plan shall be eligible for extended benefits for no more than two weeks when there is an "off indicator" in the state where the claimant files.

(f) Any amount payable under any provision of this Chapter when applicable is subject to the retirement reduction required by G.S. 96-14(9).

(g) Income Tax Withholding. — When an individual files a new claim for unemployment compensation, the individual shall be advised in writing at the time of filing that:

(1) Unemployment compensation is subject to federal and State individual income tax.
(2) Requirements exist pertaining to estimated tax payments.
(3) The individual may elect to have federal individual income tax deducted and withheld from the individual's payment of unemployment compensation at the amount specified in section 3402 of the Code. The term "Code" has the same meaning as defined in G.S. 105-228.90.
(4) The individual may elect to have State individual income tax deducted and withheld from the individual's payment of unemployment compensation in an amount determined by the individual.
(5) The individual may change a previously elected withholding status.

The Commission shall follow the procedures specified by the United States Department of Labor, the Internal Revenue Service, and the Department of Revenue pertaining to the deducting and withholding of individual income tax. The amounts deducted and withheld from unemployment compensation shall remain in the Unemployment Insurance Fund until transferred to the appropriate taxing authority as a payment of income tax. If two or more deductions are made from an individual's unemployment compensation payment, then the deductions will be deducted and withheld in accordance with priorities established by the Commission. (Ex. Sess. 1936, c. 1, s. 3; 1937, c. 448, s. 1; 1939, c. 27, ss. 1-3, 14; c. 141; 1941, c. 108, s. 1; c. 276; 1943, c. 377, ss. 1-4; 1945, c. 522, ss. 24-26; 1947, c. 326, s. 21; 1949, c. 424, ss. 19-21; 1951, c. 332, ss. 10-12; 1953, c. 401, ss. 17, 18; 1957, c. 1059, ss. 12, 13; c. 1339; 1959, c. 362, ss. 12-15; 1961, c. 454, ss. 17, 18; 1965, c. 795, ss. 15, 16; 1969, c. 575, s. 9; 1971, c. 673, ss. 25, 26; 1973, c. 1138, ss. 3-7; 1975, c. 2, ss. 1-5; 1977, c. 727, s. 52; 1979, c. 660, ss. 18, 19; 1981, c. 160, ss. 17-23; 1981 (Reg. Sess., 1982), c. 1178, ss. 3-14; 1983, c. 585, ss. 12-16; c. 625, ss. 1, 7; 1985, c. 552, s. 9; 1985 (Reg. Sess., 1986), c. 918; 1987, c. 17, s. 8; 1993, c. 122, s. 2; 1993 (Reg. Sess., 1994), c. 680, ss. 1-3; 1995 (Reg. Sess., 1996), c. 646, s. 25(a).)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective January 1, 1997, and applicable to unemployment compensation payments made on or after that date, added subsection (g).

§ 96-14. Disqualification for benefits.

CASE NOTES

I. General Consideration.
III. Misconduct.

I. GENERAL CONSIDERATION.

Burden of Proof. —

Ordinarily a claimant is presumed to be entitled to benefits under the Unemployment Compensation Act; the employer bears the burden of rebutting this presumption by showing circumstances which disqualify the claimant. Williams v. Davie County, 120 N.C. App. 160, 461 S.E.2d 25 (1995).

Cited in Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

III. MISCONDUCT.

Misconduct Not Shown. —

Claimant's failure to inform the sheriff or chief deputy of the phone tap in lieutenant's office was a violation of departmental policy; however, this violation did not rise to the level of misconduct. Rather, given the unusual circumstances, including instructions petitioner received from federal agents, petitioner's failure to report to the sheriff the phone tap he had discovered was a reasonable response to the dilemma petitioner faced. Williams v. Davie County, 120 N.C. App. 160, 461 S.E.2d 25 (1995).

§ 96-15. Claims for benefits.

CASE NOTES

ESC as Employer With Appeal Rights. — The reasoning of the Court of Appeals erroneously treated Employment Security Commission (ESC) as an agency appealing its own agency decision rather than as an "aggrieved party" where ESC appealed to Superior Court not as an agency decision-maker, but as an employer aggrieved by the agency action. As ESC-employer was liable to pay for unemployment insurance benefits the same as any other employer and had the same rights of appeal as any other employer; thus ESC-employer had the status of "aggrieved party" under ESC Regulation 21.18(D) and had appeal rights as such. Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

Applied in State ex rel. Emp. Sec. Comm'n v. Huckabee, 120 N.C. App. 217, 461 S.E.2d 787 (1995).

§ 96-17. Protection of rights and benefits; deductions for child support obligations.

CASE NOTES

Fees Prohibited. — Appeal to Superior Court by Employment Security Commission (ESC) employer was a proper proceeding under chapter 96; therefore, subsection (b1) prohibited the Superior Court award of attorney's fees. Employment Sec. Comm'n v. Peace, 341 N.C. 716, 462 S.E.2d 222 (1995).

Chapter 97.

Workers' Compensation Act.

Article 1.

Workers' Compensation Act.

Sec.

97-2. Definitions.

97-6.1. [Repealed.]

97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

97-18.1. Termination or suspension of compensation benefits.

97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

97-24. Right to compensation barred after two years; destruction of records.

97-25.1. Limitation of duration of medical compensation.

97-25.2. Managed care organizations.

97-25.3. Preauthorization.

97-25.4. Utilization guidelines for medical treatment.

97-25.5. Utilization guidelines for vocational and other rehabilitation.

97-26. Fees allowed for medical treatment; malpractice of physician.

97-26.1. Fees for medical records and reports; expert witnesses.

97-31.1. (Effective January 1, 1997, contingent on approval of constitutional amendments) Effective date of legislative changes in benefits.

97-32.1. Trial return to work.

97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

Sec.

97-40.1. Second Injury Fund.

97-42. Deduction of payments.

97-47.1. Payment without prejudice; limitations period.

97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.

97-73. Expenses of making examinations.

97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

97-77.1. (Expires July 1, 1997) Advisory council.

97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

97-83. Commission is to make award after hearing.

97-83.1. Facilities for hearings; security.

97-86. Award conclusive as to facts; appeal; certified questions of law.

97-88.2. Penalty for misrepresentation.

97-88.3. Penalty for health care providers.

97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Com-

Sec.
mission, or to solicit employment in adjusting claims; agreement for fee or compensation.
97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.
97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.
97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.
97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.
97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices.

Article 3.

Security Funds.

97-105 through 97-122. [Repealed.]

Article 4.

North Carolina Self-Insurance Guaranty Association.

97-133. Powers and duties of the Association.

ARTICLE 1.

Workers' Compensation Act.

§ 97-1. Short title.

Cross References. — As to the inapplicability of this chapter to prisoners working pursuant to § 162-58, see § 162-61.

Editor's Note. — Session Laws 1993, c. 40, s. 1, effective May 5, 1993, provides: "All insurers writing workers' compensation insurance in this State and groups that self-insure their workers' compensation liabilities in this State, shall file with the commissioner by October 1, 1993, their loss control and accident prevention consultation services plans."

Legal Periodicals. —

For note, "Workers' Compensation — Death Knell of a Good Samaritan!," commenting on Culpepper v. Fairfield Sapphire Valley, 93 N.C. App. 242, 377 S.E.2d 777 (1989), see 12 Campbell L. Rev. 121 (1989).

For note, "The Intentional-Tort Exception to the Workers' Compensation Exclusive Remedy Immunity Provisions: Woodson v. Rowland," see 70 N.C.L. Rev. 849 (1992).

For article, "An Analysis of the Retaliatory Employment Discrimination Act and Protected Activity under the Occupational Safety and Health Act of North Carolina," see 15 Campbell L. Rev. 29 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

Simultaneous Claims in Workers' Compensation and Civil Intentional Tort. — A plaintiff in North Carolina may now simultaneously pursue a workers' compensation claim and a civil intentional tort claim without being required to elect between them. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

A plaintiff should not be allowed to recover twice for a single injury; once in workers' compensation benefits and a second time in a civil action. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

Where civil action was settled for only $415,000 because plaintiff was already receiving over $700,000 in workers' compensation benefits, the threat of double recovery was negated and the combined amount of $1,197,669.09 was a single recovery. Federal Ins. Co. v. Sanfatex, Inc., 897 F. Supp. 932 (E.D.N.C. 1995).

Adoption of per diem reimbursement rule exceeded the Commission's statutory authority to review and approve hospital charges for services rendered to patients entitled to care under the Workers' Compensation Act. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Applied in Rose v. Isenhour Brick & Tile Co., 120 N.C. App. 235, 461 S.E.2d 782 (1995).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994); Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), rehearing denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

§ 97-2. Definitions.

When used in this Article, unless the context otherwise requires —

(1) Employment. — The term "employment" includes employment by the State and all political subdivisions thereof, and all public and quasi-public corporations therein and all private employments in which three or more employees are regularly employed in the same business or establishment or in which one or more employees are employed in activities which involve the use or presence of radiation, except agriculture and domestic services, unless 10 or more full-time nonseasonal agricultural workers are regularly employed by the employer and an individual sawmill and logging operator with less than 10 employees, who saws and logs less than 60 days in any six consecutive months and whose principal business is unrelated to sawmilling or logging.

(2) Employee. — The term "employee" means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written, including aliens, and also minors, whether lawfully or unlawfully employed, but excluding persons whose employment is both casual and not in the course of the trade, business, profession or occupation of his employer, and as relating to those so employed by the State, the term "employee" shall include all officers and employees of the State, including such as are elected by the people, or by the General Assembly, or appointed by the Governor to serve on a per diem, part-time or fee basis, either with or

without the confirmation of the Senate; as relating to municipal corporations and political subdivisions of the State, the term "employee" shall include all officers and employees thereof, including such as are elected by the people. The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor. The term "employee" shall include deputy sheriffs and all persons acting in the capacity of deputy sheriffs, whether appointed by the sheriff or by the governing body of the county and whether serving on a fee basis or on a salary basis, or whether deputy sheriffs serving upon a full-time basis or a part-time basis, and including deputy sheriffs appointed to serve in an emergency, but as to those so appointed, only during the continuation of the emergency. The sheriff shall furnish to the board of county commissioners a complete list of all deputy sheriffs named or appointed by him immediately after their appointment, and notify the board of commissioners of any changes made therein promptly after such changes are made. Any reference to an employee who has been injured shall, when the employee is dead, include also his legal representative, dependents, and other persons to whom compensation may be payable: Provided, further, that any employee as herein defined of a municipality, county, or of the State of North Carolina while engaged in the discharge of his official duty outside the jurisdictional or territorial limits of the municipality, county, or the State of North Carolina and while acting pursuant to authorization or instruction from any superior officer, shall have the same rights under this Article as if such duty or activity were performed within the territorial boundary limits of his employer.

Every executive officer elected or appointed and empowered in accordance with the charter and bylaws of a corporation shall be considered as an employee of such corporation under this Article.

Any such executive officer of a corporation may, notwithstanding any other provision of this Article, be exempt from the coverage of the corporation's insurance contract by such corporation specifically excluding such executive officer in such contract of insurance and the exclusion to remove such executive officer from the coverage shall continue for the period such contract of insurance is in effect, and during such period such executive officers thus exempted from the coverage of the insurance contract shall not be employees of such corporation under this Article.

All county agricultural extension service employees who do not receive official federal appointments as employees of the United States Department of Agriculture and who are field faculty members with professional rank as designated in the memorandum of understanding between the North Carolina Agricultural Extension Service, North Carolina

State University, A & T State University and the boards of county commissioners shall be deemed to be employees of the State of North Carolina. All other county agricultural extension service employees paid from State or county funds shall be deemed to be employees of the county board of commissioners in the county in which the employee is employed for purposes of workers' compensation.

The term employee shall also include members of the Civil Air Patrol currently certified pursuant to G.S. 143B-491(a) when performing duties in the course and scope of a State approved mission pursuant to Article 11 of Chapter 143B.

Employee shall not include any person performing voluntary service as a ski patrolman who receives no compensation for such services other than meals or lodging or the use of ski tow or ski lift facilities or any combination thereof.

Any sole proprietor or partner of a business or any member of a limited liability company may elect to be included as an employee under the workers' compensation coverage of such business if he is actively engaged in the operation of the business and if the insurer is notified of his election to be so included. Any such sole proprietor or partner or member of a limited liability company shall, upon such election, be entitled to employee benefits and be subject to employee responsibilities prescribed in this Article.

(3) Employer. — The term "employer" means the State and all political subdivisions thereof, all public and quasi-public corporations therein, every person carrying on any employment and the legal representative of a deceased person or the receiver or trustee of any person. The board of commissioners of each county of the State, for the purposes of this law, shall be considered as "employer" of all deputy sheriffs serving within such county, or persons serving or performing the duties of a deputy sheriff, whether such persons are appointed by the sheriff or by the board of commissioners and whether serving on a fee basis or salary basis. Each county is authorized to insure its compensation liability for deputy sheriffs to the same extent it is authorized to insure other compensation liability for employees thereof.

(4) Person. — The term "person" means individual, partnership, association or corporation.

(5) Average Weekly Wages. — "Average weekly wages" shall mean the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, including the subsistence allowance paid to veteran trainees by the United States government, provided the amount of said allowance shall be reported monthly by said trainee to his employer, divided by 52; but if the injured employee lost more than seven consecutive calendar days at one or more times during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been de-

ducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided, results fair and just to both parties will be thereby obtained. Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.

But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Wherever allowances of any character made to an employee in lieu of wages are specified part of the wage contract they shall be deemed a part of his earnings.

Where a minor employee, under the age of 18 years, sustains a permanent disability or dies leaving dependents surviving, the compensation payable for permanent disability or death shall be calculated, first, upon the average weekly wage paid to adult employees employed by the same employer at the time of the accident in a similar or like class of work which the injured minor employee would probably have been promoted to if not injured, or, second, upon a wage sufficient to yield the maximum weekly compensation benefit. Compensation for temporary total disability or for the death of a minor without dependents shall be computed upon the average weekly wage at the time of the accident, unless the total disability extends more than 52 weeks and then the compensation may be increased in proportion to his expected earnings.

In case of disabling injury or death to a volunteer fireman or member of an organized rescue squad or duly appointed and sworn member of an auxiliary police department organized pursuant to G.S. 160A-282 or senior members of the State Civil Air Patrol functioning under Article 11, Chapter 143B, under compensable circumstances, compensation payable shall be calculated upon the average weekly wage the volunteer fireman or member of an organized rescue squad or member of an auxiliary police department or senior member of the State Civil Air Patrol was earning in the employment wherein he principally earned his livelihood as of the date of injury. Provided, however, that the minimum compensation payable to a volunteer fireman, member of an organized rescue squad or sworn member of an auxiliary police department organized pursuant to G.S. 160A-282, or senior members of the State Civil Air Patrol shall be sixty-six and two thirds percent (66⅔%) of the maximum weekly benefit established in G.S. 97-29.

(6) Injury. — "Injury and personal injury" shall mean only injury by accident arising out of and in the course of the employment, and shall not include a disease in any form, except where it results naturally and unavoidably from the accident. With respect to back injuries, however, where injury to the back arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned, "injury by accident" shall be construed to include any disabling physical injury to the back arising out of and causally related to such incident. Injury shall include breakage or damage to eyeglasses, hearing aids, dentures, or other prosthetic devices which function as part of the body; provided, however, that eyeglasses and hearing aids will not be replaced, repaired, or otherwise compensated for unless injury to them is incidental to a compensable injury.

(7) Carrier. — The term "carrier" or "insurer" means any person or fund authorized under G.S. 97-93 to insure under this Article, and includes self-insurers.

(8) Commission. — The term "Commission" means the North Carolina Industrial Commission, to be created under the provisions of this Article.

(9) Disability. — The term "disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(10) Death. — The term "death" as a basis for a right to compensation means only death resulting from an injury.

(11) Compensation. — The term "compensation" means the money allowance payable to an employee or to his dependents as provided for in this Article, and includes funeral benefits provided herein.

(12) Child, Grandchild, Brother, Sister. — The term "child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent upon him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under 18 years of age.

(13) Parent. — The term "parent" includes stepparents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(14) Widow. — The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(15) Widower. — The term "widower" includes only the decedent's husband living with or dependent for support upon

her at the time of her death or living apart for justifiable cause or by reason of her desertion at such time.

(16) Adoption. — The term "adoption" or "adopted" means legal adoption prior to the time of the injury.

(17) Singular. — The singular includes the plural and the masculine includes the feminine and neuter.

(18) Hernia. — In all claims for compensation for hernia or rupture, resulting from injury by accident arising out of and in the course of the employee's employment, it must be definitely proven to the satisfaction of the Industrial Commission:

a. That there was an injury resulting in hernia or rupture.
b. That the hernia or rupture appeared suddenly.
c. Repealed by Session Laws 1987, c. 729, s. 2, effective August 5, 1987.
d. That the hernia or rupture immediately followed an accident. Provided, however, a hernia shall be compensable under this Article if it arises out of and in the course of the employment and is the direct result of a specific traumatic incident of the work assigned.
e. That the hernia or rupture did not exist prior to the accident for which compensation is claimed.

All hernia or rupture, inguinal, femoral or otherwise, so proven to be the result of an injury by accident arising out of and in the course of employment, shall be treated in a surgical manner by a radical operation. If death results from such operation, the death shall be considered as a result of the injury, and compensation paid in accordance with the provisions of G.S. 97-38. In nonfatal cases, if it is shown by special examination, as provided in G.S. 97-27, that the injured employee has a disability resulting after the operation, compensation for such disability shall be paid in accordance with the provisions of this Article.

In case the injured employee refuses to undergo the radical operation for the cure of said hernia or rupture, no compensation will be allowed during the time such refusal continues. If, however, it is shown that the employee has some chronic disease, or is otherwise in such physical condition that the Commission considers it unsafe for the employee to undergo said operation, the employee shall be paid compensation in accordance with the provisions of this Article.

(19) Medical Compensation. — The term "medical compensation" means medical, surgical, hospital, nursing, and rehabilitative services, and medicines, sick travel, and other treatment, including medical and surgical supplies, as may reasonably be required to effect a cure or give relief and for such additional time as, in the judgment of the Commission, will tend to lessen the period of disability; and any original artificial members as may reasonably be necessary at the end of the healing period and the replacement of such artificial members when reasonably necessitated by ordinary use or medical circumstances.

(20) Health care provider. — The term "health care provider" means physician, hospital, pharmacy, chiropractor, nurse, dentist, podiatrist, physical therapist, rehabilitation spe-

cialist, psychologist, and any other person providing medical care pursuant to this Article.

(21) Managed care organization. — The term "managed care organization" means a preferred provider organization or a health maintenance organization regulated under Chapter 58 of the General Statutes. (1929, c. 120, s. 2; 1933, c. 448; 1939, c. 277, s. 1; 1943, c. 543; c. 672, s. 1; 1945, c. 766; 1947, c. 698; 1949, c. 399; 1953, c. 619; 1955, c. 644; c. 1026, s. 1; c. 1055; 1957, c. 95; 1959, c. 289; 1961, cc. 231, 235; 1967, c. 1229, s. 1; 1969, c. 206, s. 2; c. 707; 1971, c. 284, s. 1; c. 1231, s. 1; 1973, c. 521, ss. 1, 2; c. 763, ss. 1-3; c. 1291, s. 14; 1975, c. 266, s. 1; c. 284, ss. 2, 3; c. 288; c. 718, s. 3; c. 817, s. 1; 1977, c. 419; c. 893, s. 1; 1979, cc. 86, 374; c. 516, ss. 4, 5; c. 714, s. 3; 1981, c. 421, ss. 1, 2; 1983, c. 833; 1983 (Reg. Sess., 1984), c. 1042, s. 1; 1985, cc. 133, 144; 1987, c. 729, ss. 1, 2; 1991, c. 703, s. 1; 1993, c. 389, s. 3; 1993 (Reg. Sess., 1994), c. 679, ss. 2.6, 10.7; 1995, c. 517, s. 35.)

Editor's Note. — Session Laws 1995, c. 517, s. 41, contains a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 2.6, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective July 5, 1994, and applicable to claims pending on or filed after that date.

Effect of Amendments. — The 1995 amendment, effective July 29, 1995, in the last paragraph of subdivision (2), substituted "or any member of a limited liability company" for "whose employees are eligible for benefits under this Article" in the first sentence, and added "or member of a limited liability company" in the last sentence.

Legal Periodicals. —

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

I. In General.
II. Employment, Employees, and Employers.
  A. In General.
  B. State and Municipal Employees.
  C. Regular Employment of Four (Now Three) or More.
  H. Apprentices.
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  A. In General.
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XVII. Disability.
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XIX. Compensation.
XX. Child, Grandchild, etc.
XXI. Widow and Widower.

I. IN GENERAL.

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Refusal to Accept Tendered Work. — Defendant's argument that the plaintiff was not disabled within the meaning of subsection (9) because they offered him employment consistent with his medical limitations (one functional arm) at no reduction in salary and that plaintiff was barred from compensation for total disability because he unjustifiably refused the tendered employment suitable to his capacity, was rejected. Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993).

Applied in Ross v. Mark's Inc., 120 N.C. App. 607, 463 S.E.2d 302 (1995).

Quoted in Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

Stated in Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993).

Cited in Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992); Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992); Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996); Murray v. Associated Insurers, Inc., 341 N.C. 712, 462 S.E.2d 490 (1995).

II. EMPLOYMENT, EMPLOYEES, AND EMPLOYERS.

A. In General.

Employees Eligible to Retire. — A claimant's entitlement to a workers' compensation disability award is unrelated to either the claimant's eligibility to retire or his decision to retire. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Volunteer Fireman to Be Treated as Employees. — Because the Workers' Compensation Act provides the specific calculation for the average weekly wage to be received by volunteer fireman in subsection (5), it is implicit that volunteer firemen are to be treated as employees under the Act. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

B. State and Municipal Employees.

Police Officers. — Even if plaintiff's preexisting knee condition contributed to the injury, plaintiff's fall while pursuing a fleeing suspect at night was a risk attributable to his employment as a police officer for defendant and was compensable. Mills v. City of New Bern, 122 N.C. App. 283, 468 S.E.2d 587 (1996).

C. Regular Employment of Four (Now Three) or More.

Evidence Held Sufficient to Show Minimum Number of Persons Regularly Employed. —

Defendants were subject to the Industrial Commission's jurisdiction where there was evidence that defendants employed, with some constancy, at least four people for the year 1987, even though there were only three regularly employed workers on the day plaintiff was injured. Grouse v. DRB Baseball Mgt., Inc., 121 N.C. App. 376, 465 S.E.2d 568 (1996).

H. Apprentices.

While plaintiff may have been a student at a technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

K. National Guard.

Injury During Initial Training. — Plaintiff was an employee of the State when he was injured at federal mandatory initial training, required before serving as a member of the National Guard by 10 U.S.C. 511(d) (which did not exist when the second sentence of this subsection was written), and accordingly was entitled to compensation under the Worker's Compensation Act because his injury arose out of and in the course of his employment with the National Guard. Britt v. North Carolina Dep't of Crime Control & Pub. Safety, 108 N.C. App. 777, 425 S.E.2d 11 (1993).

Weekend Drill. — Plaintiff, injured while performing his duties as a member of the National Guard on a routine weekend drill, was entitled to worker's compensation for injuries. Duncan v. North Carolina Dep't of Crime Control & Pub. Safety, 113 N.C. App. 184, 437 S.E.2d 654 (1993).

III. AVERAGE WEEKLY WAGES.

A. In General.

Average Weekly Wages Related to Earnings Not Earning Capacity. — Nothing in the statute defining average weekly wages warranted a conclusion that plaintiff business owner was entitled to payment at the minimum rate of $30.00 per week based on a finding that his business failed to show a net profit for the fifty-two weeks preceding his injury. Under this section, average weekly wages must be related to an employee's earnings, not to his earning capacity. McAnelly v. Wilson Pallet & Crate Co., 120 N.C. App. 127, 460 S.E.2d 894 (1995).

Most Accurate Reflection. — The Industrial Commission correctly determined claimant's earning capacity as an independent contractor under the fourth method listed in subsection (5) by averaging plaintiff's net income for the years 1988 and 1989; this interpretation most accurately reflected claimant's earning capacity. Holloway v. T.A. Mebane, Inc., 111 N.C. App. 194, 431 S.E.2d 882 (1993).

B. Illustrative Cases.

Reduction as a Result of Bankruptcy. — Where, as a result of the bankruptcy of first company decedent worked at, employee's wages at second company were depressed, Industrial Commission erred by failing to consider evidence of employee's wages at first company during the 52 weeks preceding his death. Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995).

Pulpwood Cutter. —
Where contractor was held liable for the payment of compensation for the death of a subcontractor engaged in cutting and hauling timber, the Commission should have considered a reasonable rate of depreciation on the equipment of the subcontractor as a business expense in determining the subcontractor's earnings, or alternatively, the Commission might have considered what the subcontractor would have been required to pay someone else to perform his work, or his income as reported on tax returns from earlier years showing his own income derived from similar work. Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

IV. COMPENSABLE INJURIES, GENERALLY.

Specific Hour of Injury Need Not Be Alleged. — While the case law interpreting the specific traumatic incident provision of subsection (6) requires the plaintiff to prove an injury at a cognizable time, this does not compel the plaintiff to allege the specific hour or day of the injury. Fish v. Steelcase, Inc., 116 N.C. App. 703, 449 S.E.2d 233 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995).

Back Injuries. —
Nothing in subsection (6) precludes compensation for a back injury which

occurs in the normal work routine. Fish v. Steelcase, Inc., 116 N.C. App. 703, 449 S.E.2d 233 (1994), cert. denied, 339 N.C. 737, 454 S.E.2d 650 (1995).

V. ACCIDENT.

Plaintiff, who had been employed by defendant for five years in an office job before her work-related injury and who testified that she was not yet proficient in defendant's filling department, was not performing her usual work routine at the time of accidental injury on her fifth day on the production line; thus, the commission's conclusion that the plaintiff suffered an injury by accident was accordingly upheld. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

"Specific traumatic incident" amendment to subdivision (6) was intended to supplement the law

Back injuries that occur gradually, over long periods of time, are not specific traumatic incidents; however, events which occur contemporaneously, during a cognizable time period, and which cause a back injury, do fit the definition intended by the legislature. Glynn v. Pepcom Indus., Inc., 122 N.C. App. 348, 469 S.E.2d 588 (1996).

Evidence Insufficient to Find Back Injury. — Where plaintiff injured her back during her previous employment, was treated for back pain over a period of time, and the pain which plaintiff experienced during her employment with defendant was in the same area of her back that had been injured during plaintiff's prior employment, there was competent evidence to support the Commission's findings and conclusion that plaintiff's back condition was neither caused by nor aggravated by an injury, by accident or by specific traumatic incident at her new employment. Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 458 S.E.2d 746 (1995).

VI. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT.

A. In General.

Injury While Performing Task Which Was Not Part of Job. —

Where the employer did not own or control the public street on which plaintiff was injured, where plaintiff was not performing any duties for employer at the time of the injury and was not exposed to any greater danger than that of the public generally, plaintiff did not suffer an injury arising out of and in the course of his employment. Royster v. Culp, Inc., 343 N.C. 279, 470 S.E.2d 30 (1996).

A volunteer fireman, who is injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

C. In the Course of.

Living in Company Housing. — Where migrant farm worker who lived in company housing was injured while taking a shower after work, although the nature of his employment arguably required that he live on the premises, at the time of his injury he was not on call, and the connection between his employment and his injury was not sufficient to establish that the injury arose out of and in the course of his employment. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

VIII. INJURIES WHILE GOING TO AND FROM WORK.

A. In General.

Same — Illustrative Case. — Where decedent was required, as a condition of his employment, to attend a four-week training seminar which was not offered at his regular place of employment, he was on a special errand to attend a training course at the direction of and for the benefit of his employer. Kirk v. State Dep't of Cor., 121 N.C. App. 129, 465 S.E.2d 301 (1995).

Accident Returning from Meeting Held Not Part of Duties. — Although plaintiff's presence was required at a meeting after which his accident occurred, his travel from that meeting should not be included within the scope of his employment duties. Being required to drive one's car to a meeting is no different from being required to drive one's car to work. When plaintiff left the meeting he was not traveling to a destination required by his employer nor was he engaged in the furtherance of his employer's business. Wright v. Wake County Pub. Schs., 103 N.C. App. 282, 405 S.E.2d 228 (1991).

XV. HERNIA.

Legislative Use of the Term. — The medical condition known as "hernia" is not specifically defined in either the Worker's Compensation Act or in the case law. Although the Court of Appeals has declined to define the term hernia, it has noted that the legislature's use of the term hernia in conjunction with the word rupture in the statute, "hernia or rupture," seems to indicate that something less than full extension through the organ wall is contemplated. Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991), cert. denied, 330 N.C. 613, 412 S.E.2d 87 (1992).

XVI. ILLUSTRATIVE CASES.

D. Miscellaneous Cases.

Injuries to Truck Driver on Route. — Findings of commission that heart attack suffered by truck driver while driving his route was not the result of an accident or occupational disease caused by stress, equipment, and long hours upheld. Dye v. Shippers Freight Lines, 118 N.C. App. 280, 454 S.E.2d 845 (1995).

Subarachnoid Hemorrhage. — Where the evidence indicated that decedent died from a subarachnoid hemorrhage, which is not a compensable cause, the presumption of compensability was not applicable and the Commission did not err by not applying it. Gilbert v. Entenmann's, Inc., 113 N.C. App. 619, 440 S.E.2d 115 (1994).

XVII. DISABILITY.

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions. i.e. age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Award of Disability Benefits Appropriate Remedy. — Where the full Commission found that defendants had not presented convincing evidence that defendant-store had offered or obtained employment for plaintiff consistent with her limitations, and where plaintiff met the burden of showing injury to her wage earning capacity, the full Commission was correct in finding that the disability continued, and ongoing award of disability benefits was the appropriate remedy. Simmons v. Kroger Co., 117 N.C. App. 440, 451 S.E.2d 12 (1994).

Plaintiff, after having shown credible evidence of diligent efforts to find employment, was entitled to receive compensation benefits where his inability to earn the same wages was caused in part by unavailability of area jobs consistent with his physical limitations. Fletcher v. Dana Corp., 119 N.C. App. 491, 459 S.E.2d 31 (1995), rehearing denied, 342 N.C. 191, 463 S.E.2d 235 (1995).

XVIII. BURDEN OF PROOF AND EVIDENCE.

Evidence of Effort to Find other Employment. — An injured employee seeking an award of total disability under this section who is unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable, must produce evidence of reasonable effort to find other employment. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Commission's Factual Determinations Binding Upon Court. — Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

Insufficient Evidence of Earning Capacity. — There was no competent evidence to support the Commission's findings that plaintiff was capable of earning $12.00 per hour, that other suitable jobs for which plaintiff was qualified were available, that any other positions for which plaintiff was qualified would pay $12.00 per hour, that plaintiff would be able to secure such a position, and that plaintiff's ability to obtain a temporary position paying $12.00 per hour meant that plaintiff, when permanently employed, would receive $12.00 per hour. Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994).

XIX. COMPENSATION.

Calculation Based on Wages at Time of Diagnosis. — Plaintiff who was diagnosed with silicosis was entitled to compensation calculated based on his average weekly wage at the time he was diagnosed, not at the time of his last exposure or at the time he was "removed from the industry". Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996).

XX. CHILD, GRANDCHILD, ETC.

Illegitimate Child. —
To qualify for survivor's benefits under the act, an illegitimate child must be acknowledged in sufficient fashion by the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Legal Adoption Incomplete. — Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee. Lennon v. Cumberland County, 119 N.C. App. 319, 458 S.E.2d 240 (1995).

XXI. WIDOW AND WIDOWER.

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

"Justifiable Cause" for Living Separate and Apart. —
There is no specific formula for the definition of "justifiable cause" under the statute. A court must consider the complexity and history of the particular relationship in order to determine whether the marital partners were separated for justifiable cause in the months before the death of a recipient of benefits. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Adultery. — A wife's adulterous affair did not bar her from qualifying as her husband's widow under subdivision (14) of this section and § 97-39. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

It is not within the authority of courts to create an exception to subdivision (14) of this section and § 97-39 based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

§ 97-6. No special contract can relieve an employer of obligations.

CASE NOTES

Cited in Tellado v. Ti-Caro Corp., 119 N.C. App. 529, 459 S.E.2d 27 (1995).

§ 97-6.1: Repealed by 1991 (Regular Session, 1992), c. 1021, s. 4, effective October 1, 1992.

Cross References. — For present provisions regarding the subject matter of the repealed section, see § 95-240 et seq.

§ 97-9. Employer to secure payment of compensation.

Legal Periodicals. —
For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Com-

pensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For comment, "From Andrews to Woodson and Beyond: The Development of the Intentional Tort Exception to the Exclusive Remedy Provision—Rescuing North Carolina Workers from Treacherous Waters," see 20 N.C. Cent. L.J. 164 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

CASE NOTES

Act Provides Exclusive Remedy. — Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Effect of Release Agreement on Employee's Remedies. — Once a plaintiff signs a release agreement to settle a workers' compensation claim that plaintiff is not automatically precluded from recovering pursuant to Woodson v. Rowland, 329 N.C. 33, 407 S.E.2d 222 (1991), and does not automatically admit the injury was solely accidental to the exclusion of a claim against an employer for tortious conduct. Owens v. W.K. Deal Printing, Inc., 113 N.C. App. 324, 438 S.E.2d 440 (1994), rev'd on other grounds, 339 N.C. 603, 453 S.E.2d 160 (1995).

Election Between Remedies Not Required. — A claimant may, but is not required to, elect between a civil remedy and a remedy under the Workers' Compensation Act but, in any event, is entitled to but one recovery. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

Woodson v. Rowland Applies Retroactively. — The Supreme Court's decision in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), which is annotated above, applies retroactively, even though the Woodson court was silent on whether its decision was to operate retroactively. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Evidence Insufficient for Exception to Apply. — Where there was no evidence that defendant was aware, prior to employee's death, of a high probability that his equipment would fail, plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), exception to the exclusivity provisions of the Worker's Compensation Act. Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995).

Woodson v. Rowland Elements Existed. — The allegations of misconduct, particularly the directing of the plaintiffs to work on a billboard after notice of its dangerous condition, were sufficient to support a reasonable inference that each of the four elements of a claim existed under Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991). Pastva v. Naegele Outdoor Adv., 121 N.C. App. 656, 468 S.E.2d 491 (1996).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993).

§ 97-10.1. Other rights and remedies against employer excluded.

Legal Periodicals. —

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

For note, "North Carolina's Expansion of the Definition of 'Intentional' in Exceptions to the Exclusivity of Workers' Compensation: Is Legislative Action 'Substantially Certain' to Follow? — Woodson v. Rowland", see 27 Wake Forest L. Rev. 797 (1992).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For article, "The Substantial Certainty Exception to Workers' Compensation," see 17 Campbell L. Rev. 413 (1995).

CASE NOTES

Employee's Rights and Remedies Hereunder Are Exclusive. —

Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. North Carolina Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

An employee cannot elect to pursue an alternate avenue of recovery, etc. —

Where a prisoner who suffered accidental death arising out of and in the course of the employment to which he had been assigned, his dependents or next of kin were entitled to specific benefits under this Act; therefore, inmate's mother could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Civil Action Allowed for Employer's Misconduct Substantially Certain to Cause Injury or Death. — When an employer intentionally engages in misconduct knowing it is substantially certain to cause serious injury or death to employees and an employee is injured or killed by that misconduct, that employee, or the personal representative of the estate in case of death, may pursue a civil action against the employer as well as a claim for workers' compensation as such misconduct is tantamount to an intentional tort, and civil actions based thereon are not barred by the exclusivity provisions of the Workers' Compensation Act. Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991).

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Evidence Insufficient for Exception to Apply. — Where there was no evidence that defendant was aware, prior to employee's death, of a high probability that his equipment would fail, plaintiff failed to forecast evidence sufficient to create a genuine issue of material fact regarding defendant's liability under the Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991), exception to the exclusivity provisions of the Worker's Compensation Act. Mickles v. Duke Power Co., 342 N.C. 103, 463 S.E.2d 206 (1995).

Co-employee Civil Liability. — The Workers' Compensation Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, or reckless negligence. Dunleavy v. Yates Constr. Co., 106 N.C. App. 146, 416 S.E.2d 193, cert. denied, 332 N.C. 343, 421 S.E.2d 146 (1992).

A volunteer fireman, who is injured by the negligence of a fellow volunteer fireman, at a time when both are acting in the course and scope of their duties, is barred from pursuing a negligence action against the fellow fireman. Hix v. Jenkins, 118 N.C. App. 103, 453 S.E.2d 551 (1995).

Student Performing Respiratory Therapy at Hospital Gained Apprentice Status. — While plaintiff may have been a student at technical institute, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Hence, Separate Tort Action against Employer Is Barred. —

The monetary benefit afforded to plaintiff by § 97-13(c) entitled her to compensation and this section applied to bar plaintiff's wrongful death action under the Tort Claims Act. Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Wrongful Death Action Precluded. —

Where deceased was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin were statutorily "entitled" to specific benefits under the exclusive remedy provisions of this section, and could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Allegations Sufficient to Withstand Motion to Dismiss. — Allegations of employee who suffered serious injuries when his arm and body were caught in paint machine, for which emergency switches were inoperable, were held sufficient to withstand a motion to dismiss for failure to state a claim. Regan v. Amerimark Bldg. Prods., Inc., 118 N.C. App. 328, 454 S.E.2d 849 (1995).

Summary Judgment Appropriate. — In an action by employee against employer seeking compensatory and punitive damages for accident that occurred at work, the trial court did not err in granting defendant's motion for summary judgment, because no genuine issue of material fact existed as to whether defendant engaged in intentional misconduct knowing this conduct was substantially certain to cause death or serious injury to plaintiff. Vaughan v. J.P. Taylor Co., 114 N.C. App. 651, 442 S.E.2d 538 (1994), cert. denied, 336 N.C. 615, 447 S.E.2d 413 (1994).

Cited in Amos v. Oakdale Knitting Co., 331 N.C. 348, 416 S.E.2d 166 (1992); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Bynum v. Frederickson Motor Express Corp., 112 N.C. App. 125, 434 S.E.2d 241 (1993); Henderson v. Henderson, 121 N.C. App. 752, 468 S.E.2d 454 (1996).

§ 97-10.2. Rights under Article not affected by liability of third party; rights and remedies against third parties.

Legal Periodicals. —

For note, "A New Exception to the Exclusivity Provision of the North Carolina Workers' Compensation Act — Woodson v. Rowland," see 14 Campbell L. Rev. 261 (1992).

CASE NOTES

I. In General.
II. Respective Liability of Third Party, Employer and Carrier.
III. Parties and Procedure.
IV. Disbursement of Proceeds.

I. IN GENERAL.

Choice of Law. — Where all the parties were North Carolina citizens; the plaintiff's contract of employment and the contracts giving rise to the workers' compensation coverage were signed in North Carolina; and the plaintiff was receiving benefits under our workers' compensation statute, North Carolina's interests in implementing the protections afforded by its statute were paramount. An employee's temporary presence in Virginia so as to carry out his employment contract did not strip him of the rights he otherwise enjoyed under the North Carolina workers' compensation statute with regard to the breadth of North Carolina's exclusive remedy bar on common law actions in tort. Braxton v. Anco Elec., Inc., 330 N.C. 124, 409 S.E.2d 914 (1991).

Amount of Judgment. — Giving the statute its plain meaning requires the court to read the term "judgment" to mean just that, and to reject the argument that the court should look only at the insurance "proceeds" that a party is to receive, as opposed to the entire judgment, in determining the applicability of this section. Hieb v. Lowery, 121 N.C. App. 33, 464 S.E.2d 308 (1995).

Evidence of out-of-state worker's compensation payments is admissible in actions against third parties. Frugard v. Pritchard, 338 N.C. 508, 450 S.E.2d 744 (1994).

Interaction with Tort Claims Act. — Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. North Carolina Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

Applied in Sheppard v. Zep Mfg. Co., 114 N.C. App. 25, 441 S.E.2d 161 (1994); Martinez v. Lovette, 121 N.C. App. 712, 468 S.E.2d 251 (1996).

II. RESPECTIVE LIABILITY OF THIRD PARTY, EMPLOYER AND CARRIER.

Evidence of out-of-state worker's compensation payments is admissible in actions against third parties. Frugard v. Pritchard, 338 N.C. 508, 450 S.E.2d 744 (1994).

The workers' compensation carrier for plaintiffs had a subrogation lien on the uninsured motorist policy proceeds paid to plaintiff employee who was injured in an automobile accident occurring while within the scope of employment. Bailey v. Nationwide Mut. Ins. Co., 112 N.C. App. 47, 434 S.E.2d 625 (1993).

III. PARTIES AND PROCEDURE.

The workers' compensation benefits received by plaintiff under Virginia's Workers' Compensation Act should have been allowed into evidence pursuant to subsection (e) in plaintiff's third party personal injury action. Frugard v. Pritchard, 112 N.C. App. 84, 434 S.E.2d 620 (1993), rev'd on other grounds, 338 N.C. 508, 450 S.E.2d 744 (1994), cert. granted, 335 N.C. 554, 441 S.E.2d 113 (1994).

Retroactive Application. — The trial court's application of the amended version of this section deprived employer and insurer of vested rights under lien and, thus, was unconstitutionally retroactive. Fogleman v. D & J Equip. Rental, Inc., 111 N.C. App. 228, 431 S.E.2d 849, cert. denied, 335 N.C. 172, 436 S.E.2d 374 (1993).

IV. DISBURSEMENT OF PROCEEDS.

Coverage by Same Entity Not Required. — In order to have amounts payable under underinsured motorist coverage reduced by amounts paid under workers' compensation coverage, § 20-279.21(e) does not require that the same entity provide both coverages. Brantley v. Starling, 336 N.C. 567, 444 S.E.2d 170 (1994).

Jurisdiction Over Distribution with Court or Commission. — Under this section, the distribution of proceeds received from a tortfeasor between an injured employee and an employer entitled to reimbursement can be decided in some instances by either the Industrial Commission or the trial court. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Limitation on Commission; Authority. — The authority of the Industrial Commission to distribute the proceeds of the employer-employee settlement with the tortfeasor is governed by subsection (f) which does not have the authority to make a distribution pursuant to subsection (j). Buckner

v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Findings of Fact Required to Be Made by Commission. — The commission must make findings of fact regarding the benefits provided for the treatment of an injured employee for which an employer is entitled to reimbursement. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Recovery by Employer of His Underinsured Motorist Benefits. — The employer's underinsured motorist benefits received in an action against the tortfeasor are subject to a subrogation claim by an employer who has paid workers' compensation benefits to its employee. Buckner v. City of Asheville, 113 N.C. App. 354, 438 S.E.2d 467, cert. denied, 336 N.C. 602, 447 S.E.2d 385 (1994).

Workers' Compensation Benefits and Uninsured Motorists Coverage. — Defendant insurance company, insurer of vehicle plaintiff was driving at the time of collision, was not entitled to reduce the limits of its uninsured motorists coverage by any amounts paid to plaintiff by her employer's workers' compensation insurance carrier as workers' compensation benefits; employer's workers' compensation insurance carrier was entitled to a lien against all amounts paid or to be paid to plaintiff by defendant insurer of vehicle. Hieb v. St. Paul Fire & Marine Ins. Co., 112 N.C. App. 502, 435 S.E.2d 826 (1993).

§ 97-11. Employer not relieved of statutory duty.

CASE NOTES

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-12. Use of intoxicant or controlled substance; willful neglect; willful disobedience of statutory duty, safety regulation or rule.

CASE NOTES

II. Illustrative Cases.

II. ILLUSTRATIVE CASES.

Employer's Failure to Meet Burden. — Given the presence of competent evidence on both sides of the issue of whether intoxication was a proximate cause of death, the employer did not carry its burden on this issue. Strickland v. Carolina Classics Catfish, Inc., 119 N.C. App. 97, 458 S.E.2d 10 (1995), aff'd, 342 N.C. 640, 466 S.E.2d 276 (1996).

All of the competent evidence supported the Commission's finding that defendants did not meet their burden of showing that plaintiff's use of controlled substances was a proximate cause of his injury. Bursey v. Kewaunee Scientific Equip. Corp., 119 N.C. App. 522, 459 S.E.2d 40 (1995).

Injury Held Result of Intoxication. —

There was competent evidence in the record to support a finding that the deceased was intoxicated where decedent's blood alcohol level of .202, would have rendered her borderline between simple impairment and extreme excitement and confusion. Sidney ex rel. Sidney v. Raleigh Paving & Patching, Inc., 109 N.C. App. 254, 426 S.E.2d 424 (1993).

Where there was insufficient evidence to establish that the blood alcohol test was scientifically reliable or correctly administered, it could not be used to deny plaintiff's claim pursuant to the intoxication defense in subdivision (1). Johnson v.

Charles Keck Logging, 121 N.C. App. 598, 468 S.E.2d 420 (1996).

§ 97-13. Exceptions from provisions of Article.

CASE NOTES

VI. Prisoners.

VI. PRISONERS.

Suspension of Workers' Compensation Benefits During Incarceration. — Imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement. Parker v. Union Camp Corp., 107 N.C. App. 505, 422 S.E.2d 585 (1992).

Action for Wrongful Death. — Where decedent was a prisoner who suffered an accidental death arising out of and in the course of his assigned employment, plaintiff was entitled to workers' compensation benefits under subsection (c). Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

Action for Wrongful Death under Tort Claims Act. —

Where a prisoner who suffered accidental death arising out of and in the course of the employment to which he had been assigned, his dependents or next of kin were entitled to specific benefits under the Act; therefore, inmate's mother could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Where the plaintiff was permanently injured while working on a silage harvesting machine operated by the Department of Correction, and he filed a claim with the Industrial Commission under the Tort Claims Act, his claim was properly dismissed on the grounds that workers' compensation was plaintiff's exclusive remedy. Richardson v. North Carolina Dep't of Cor., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

Where deceased was a prisoner who suffered "accidental death arising out of and in the course of the employment to which he had been assigned," his dependents or next of kin were statutorily "entitled" to specific benefits under the exclusive remedy provisions of § 97-10.1, and could not maintain a wrongful death action against defendants under the Tort Claims Act. Blackmon v. North Carolina Dep't of Cors., 118 N.C. App. 666, 457 S.E.2d 306 (1995), aff'd, 343 N.C. 259, 470 S.E.2d 8 (1996).

Workers' Compensation Act Sole Remedy. — A prisoner's exclusive remedy for "accidental injury ... arising out of and in the course of the employment to which he had been assigned," whether he is incarcerated or released, as with other employees, arises under the provisions of the Workers' Compensation Act and is the plaintiff's sole remedy. Richardson v. North Carolina Dep't of Cors., 118 N.C. App. 704, 457 S.E.2d 325, cert. granted, — N.C. —, 461 S.E.2d 772 (1995).

The monetary benefit afforded to plaintiff by subsection (c) entitled her to compensation and § 97-10.1 applied to bar plaintiff's wrongful death action under the Tort Claims Act. Blackmon v. N.C. Dept. Of Correction, 343 N.C. 259, 470 S.E.2d 8 (1996).

§ 97-17. Settlements allowed in accordance with Article.

Legal Periodicals. —

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

When Approved by the Commission. — Agreement between worker and employer to pay worker compensation, which is approved by the Industrial Commission, becomes an award of the Commission. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Commission May Not Set Aside Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with this section and § 97-82. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Defendant could not establish the existence of any of the factors listed in this section that would require the Commission to set aside a previously approved I.C. Form 26. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996).

Settlement Agreement Was Not Set Aside on Mutual Mistake Ground. — The Industrial Commission properly determined that plaintiff, who suffered a back injury and sought to set aside settlement agreement for payment of workers' compensation, was not entitled to have the agreement set aside pursuant to this section on the basis of mutual mistake. Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676, rev'd in part, petition for discretionary review improvidently granted in part, 336 N.C. 425, 444 S.E.2d 191 (1994).

Employer's Mistaken Representation Agreement Was a "Proper One." — Where documents, stipulations and findings indisputably showed that the parties and Commission acted upon defendant employer's mistaken representation that the original compensation agreement was a "proper one," and since the mistake benefited its initiator to the detriment of the misinformed, acquiescent plaintiff, fundamental equitable principles required that the mistake not be perpetuated. Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

Releases by employers to obtain relief from the obligations created under the Workers' Compensation Act do not bar a retaliatory discharge claim under former § 97-6.1. Tellado v. Ti-Caro Corp., 119 N.C. App. 529, 459 S.E.2d 27 (1995).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-18. Prompt payment of compensation required; installments; payment without prejudice; notice to Commission; penalties.

(a) Compensation under this Article shall be paid periodically, promptly and directly to the person entitled thereto unless otherwise specifically provided.

(b) When the employer admits the employee's right to compensation, the first installment of compensation payable by the employer shall become due on the fourteenth day after the employer has written or actual notice of the injury or death, on which date all compensation then due shall be paid. Compensation thereafter shall be paid in installments weekly except where the Commission determines that payment in installments should be made monthly or at some other period. Upon paying the first installment of compensation and upon suspending, reinstating, changing, or modifying such compensation for any cause, the insurer shall immediately notify the Commission, on a form prescribed by the Commission, that compensation has begun, or has been suspended, reinstated, changed, or modified. A copy of each notice shall be provided to the employee. The first notice of payment to the Commission shall contain the date and nature of the injury, the average weekly wages of the employee, the weekly compensation rate, the date the disability resulting from the injury began, and the date compensation commenced.

(c) If the employer denies the employee's right to compensation, the employer shall notify the Commission, on or before the fourteenth day after it has written or actual notice of the injury or death, and advise the employee in writing of its refusal to pay compensation on a form prescribed by the Commission. This notification shall (i) include the name of the employee, the name of the employer, the date of the alleged injury or death, the insurer on the risk, if any, and a detailed statement of the grounds upon which the right to compensation is denied, and (ii) advise the employee of the employee's right to request a hearing pursuant to G.S. 97-83.

(d) In any claim for compensation in which the employer or insurer is uncertain on reasonable grounds whether the claim is compensable or whether it has liability for the claim under this Article, the employer or insurer may initiate compensation payments without prejudice and without admitting liability. The initial payment shall be accompanied by a form prescribed by and filed with the Commission, stating that the payments are being made without prejudice. Payments made pursuant to this subsection may continue until the employer or insurer contests or accepts liability for the claim or 90 days from the date the employer has written or actual notice of the injury or death, whichever occurs first, unless an extension is granted pursuant to this section. Prior to the expiration of the 90-day period, the employer or insurer may upon reasonable grounds apply to the Commission for an extension of not more than 30 days. The initiation of payment does not affect the right of the employer or insurer to continue to investigate or deny the compensability of the claim or its liability therefor during this period. If at any time during the 90-day period or extension thereof, the employer or insurer contests the compensability of the claim or its liability therefor, it may suspend payment of compensation and shall promptly notify the Commission and the employee on a form prescribed by the Commission. The employer or insurer must provide on the prescribed form a detailed statement of its grounds for denying compensability of the claim or its liability therefor. If the employer or insurer does not contest the compensability of the claim or its liability therefor within 90 days from the date it first has written or actual notice of the injury or death, or within such additional period as may be granted by the Commission, it waives the right to contest the compensability of and its liability for the claim under this Article. However, the employer or insurer may contest the compensability of or its liability for the claim after the 90-day period or extension thereof when it can show that material evidence was discovered after that period that could not have been reasonably discovered earlier, in which event the employer or insurer may terminate or suspend compensation subject to the provisions of G.S. 97-18.1.

(e) The first installment of compensation payable under the terms of an award by the Commission, or under the terms of a judgment of the court upon an appeal from such an award, shall become due 10 days from the day following expiration of the time for appeal from the award or judgment or the day after notice waiving the right of appeal by all parties has been received by the Commission, whichever is sooner. Thereafter compensation shall be paid in installments weekly, except where the Commission determines that payment in installments shall be made monthly or in some other manner.

(f) The employer's or insurer's grounds for contesting the employee's claim or its liability therefor as specified in the notice suspending compensation under subsection (d) of this section are the only bases for the employer's or insurer's defense on the issue of compensability in a subsequent proceeding, unless the defense is based on newly discovered material evidence that could not reasonably have been discovered prior to the notice suspending compensation.

(g) If any installment of compensation is not paid within 14 days after it becomes due, there shall be added to such unpaid installment an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such installment, unless such nonpayment is excused by the Commission after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(h) Within 16 days after final payment of compensation has been made, the employer shall send to the Commission and the employee a notice, in accordance with a form prescribed by the Commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the Commission or the employee within such time, the Commission shall assess against such employer a civil penalty in the amount of twenty-five dollars ($25.00).

(i) If any bill for services rendered under G.S. 97-25 by any provider of health care is not paid within 60 days after it has been approved by the Commission and returned to the responsible party, or within 60 days after it was properly submitted, in accordance with the provisions of this Article, to an insurer or managed care organization responsible for direct reimbursement pursuant to G.S. 97-26(g), there shall be added to such unpaid bill an amount equal to ten per centum (10%) thereof, which shall be paid at the same time as, but in addition to, such medical bill, unless such late payment is excused by the Commission. (1929, c. 120, s. 18½; 1967, c. 1229, s. 2; 1979, c. 249, ss. 1, 2; c. 599; 1993 (Reg. Sess., 1994), c. 679, s. 3.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.1, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective July 5, 1994, and applicable to claims pending on or filed after that date.

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.1, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims filed on or after that date, inserted "payment without prejudice" in the section catchline.

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

Cited in Plummer v. Henderson Storage Co., 118 N.C. App. 727, 456 S.E.2d 886 (1995).

§ 97-18.1. Termination or suspension of compensation benefits.

(a) Payments of compensation pursuant to an award of the Commission shall continue until the terms of the award have been fully satisfied.

(b) An employer may terminate payment of compensation for total disability being paid pursuant to G.S. 97-29 when the employee has returned to work for the same or a different employer, subject to the provisions of G.S. 97-32.1, or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder. The employer shall promptly notify the Commission and the employee, on a form prescribed by the Commission, of the termination of compensation and the availability of trial return to work and additional compensation due the employee for any partial disability.

(c) An employer seeking to terminate or suspend compensation being paid pursuant to G.S. 97-29 for a reason other than those specified in subsection (b) of this section shall notify the employee and the employee's attorney of record in writing of its intent to do so on a form prescribed by the Commission. A copy of the notice shall be filed with the Commission. This form shall contain the reasons for the proposed termination or suspension of compensation, be supported by available documentation, and inform the employee of the employee's right to contest the termination or suspension by filing an objection in writing with the Commission within 14 days of the date the employer's notice is filed with the Commission or within such additional reasonable time as the Commission may allow.

(d) If the employee fails to object to the employer's notice of proposed termination or suspension within the time provided, the Commission may enter an appropriate order terminating or suspending the compensation if it finds that there is a sufficient basis under this Article for this action. If the employee files a timely objection to the employer's notice, the Commission shall conduct an informal hearing by telephone with the parties or their counsel. If either party objects to conducting the hearing by telephone, the Commission may conduct the hearing in person in Raleigh or at another location selected by the Commission. The parties shall be afforded an opportunity to state their position and to submit documentary evidence at the informal hearing. The employer may waive the right to an informal hearing and proceed to the formal hearing. The informal hearing, whether by telephone or in person, shall be conducted only on the issue of termination or suspension of compensation and shall be conducted within 25 days of the receipt by the Commission of the employer's notice to the employee unless this time is extended by the Commission for good cause. The Commission shall issue a decision on the employer's application for termination of compensation within five days after completion of the informal hearing. The decision shall (i) approve the application, (ii) disapprove the application, or (iii) state that the Commission is unable to reach a decision on the application in an informal hearing, in which event the Commission shall schedule a formal hearing pursuant to G.S. 97-83 on the employer's application for termination of compensation. Compensation may be terminated or suspended by the employer following an informal hearing only if its application is approved. If the Commission was unable to reach a decision in the informal hearing, the employee's compensation shall continue pending a decision by the Commission in the formal hearing. The Commission's decision in the informal hearing is not binding in subsequent hearings.

The employer or the employee may request a formal hearing pursuant to G.S. 97-83 on the Commission's decision approving or denying the employer's application for termination of compensation. A formal hearing under G.S. 97-83 ordered or requested pursuant to this section shall be a hearing de novo on the employer's application for termination or suspension of compensation and may be scheduled by the Commission on a preemptive basis.

(e) At an informal hearing on the issue of termination or suspension of compensation, and at any subsequent hearing, the Commission may address related issues regarding the selection of medical providers or treatment under G.S. 97-25, subject to exhaustion of the dispute resolution procedures of a managed care organization pursuant to G.S. 97-25.2. (1993 (Reg. Sess., 1994), c. 679, ss. 3.6, 10.9.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(a), made this section effective October 1, 1994, and applicable to claims pending on or filed after that date.

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, ss. 3.6, 10.9, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, added "or when the employer contests a claim pursuant to G.S. 97-18(d) within the time allowed thereunder" at the end of the first sentence of subsection (b).

§ 97-19. Liability of principal contractors; certificate that subcontractor has complied with law; right to recover compensation of those who would have been liable; order of liability.

Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by a workers' compensation insurance carrier, or a certificate of compliance issued by the Department of Insurance to a self-insured subcontractor, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service fewer than three employees in the same business within this State, to the same extent as such subcontractor would be if he were subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract. If the principal contractor, intermediate contractor or subcontractor shall obtain such certificate at the time of subletting such contract to subcontractor, he shall not thereafter be held liable to any employee of such subcontractor for compensation or other benefits under this Article.

Any principal contractor, intermediate contractor, or subcontractor paying compensation or other benefits under this Article, under the foregoing provisions of this section, may recover the amount so paid from any person, persons, or corporation who independently of such provision, would have been liable for the payment thereof.

Every claim filed with the Industrial Commission under this section shall be instituted against all parties liable for payment, and said Commission, in its award, shall fix the order in which said parties shall be exhausted, beginning with the immediate employer.

The principal or owner may insure any or all of his contractors and their employees in a blanket policy, and when so insured such contractor's employees will be entitled to compensation benefits regardless of whether the relationship of employer and employee exists between the principal and the contractor. (1929, c. 120, s. 19; 1941, c. 358, s. 1; 1945, c. 766; 1973, c. 1291, s. 10; 1979, c. 247, s. 2; 1987, c. 729, s. 4; 1989, c. 637; 1991, c. 703, s. 7; 1993 (Reg. Sess., 1994), c. 679, s. 10.6; 1995, c. 517, s. 36; 1995 (Reg. Sess., 1996), c. 555, s. 1.)

Editor's Note. — Session Laws 1995, c. 517, s. 41, contains a severability clause.

Effect of Amendments. — The 1995 amendment, effective October 1, 1995, deleted the last two sentences of the first paragraph, regarding subcontractors who have no employees.

The 1995 (Reg. Sess., 1996) amendment, effective June 10, 1996, in the first paragraph, twice deleted "any such subcontractor, any principal or partner of such subcontractor or" preceding "any employee of such subcontractor."

CASE NOTES

Editor's Note. *— The annotation to Carroll v. Daniels & Daniels Constr. Co., 96 N.C. App. 649, 386 S.E.2d 752, cert. granted, 326 N.C. 594, 393 S.E.2d 874 (1990), which appears under this section in the main volume beneath the catchline:* ***"Defendant-Carrier Estopped from Denying Coverage"****, should be disregarded. The North Carolina Supreme Court reversed this decision in Carroll v. Daniels & Daniels Constr. Co., 327 N.C. 616, 398 S.E.2d 325 (1990). The latter decision is also annotated under section in the main volume beneath the catchlines:* ***"In order to extend workers' compensation insurance contract,"*** *etc., and* ***"Evidence Insufficient to Support Estoppel of Carrier."***

Exclusive Remedy. — Defendant principal contractor was plaintiff's statutory employer and the workers' compensation benefits available to plaintiff through defendant's workers' compensation carrier constituted plaintiff's exclusive remedy against defendant for plaintiff's injuries. Rich v. R.L. Casey, Inc., 118 N.C. App. 156, 454 S.E.2d 666 (1995).

This section protects the employees of a subcontractor, etc. —

When a principal contractor sublets part of the contract to an independent contractor, that independent contractor's employees are protected by this section if the independent contractor is uninsured. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

But subcontractor is not entitled to immunity from civil suit merely because principal contractor secured workers' compensation insurance coverage for subcontractor's employees. Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

Applied in Dalton v. Anvil Knitwear, 119 N.C. App. 275, 458 S.E.2d 251 (1995).

Quoted in Postell v. B & D Constr. Co., 104 N.C. App. 1, 411 S.E.2d 413 (1992).

Cited in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994).

§ 97-21. Claims unassignable and exempt from taxes and debts; agreement of employee to contribute to premium or waive right to compensation void; unlawful deduction by employer.

No claim for compensation under this Article shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors and from taxes.

No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Article shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Article shall be guilty of a Class 3 misdemeanor and upon conviction thereof shall be punished only by a fine of not more than five hundred dollars ($500.00). No agreement by an employee to waive his right to compensation under this Chapter shall be valid. (1929, c. 120, s. 21; 1993, c. 539, s. 677; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 677, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 97-22. Notice of accident to employer.

CASE NOTES

Commission's Findings Conclusive, etc. —

Whether a plaintiff was injured by accident and had a reasonable excuse for not giving the employer timely notice were factual issues that depended entirely upon her credibility. Since the Commission found, as its prerogative as fact finder permitted, that plaintiff's testimony was not credible, that determination was binding upon the Court of Appeals. Elliot v. A.O. Smith Corp., 103 N.C. App. 523, 405 S.E.2d 799 (1991).

§ 97-24. Right to compensation barred after two years; destruction of records.

(a) The right to compensation under this Article shall be forever barred unless (i) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission or the employee is paid compensation as provided under this Article within two years after the accident or (ii) a claim or memorandum of agreement as provided in G.S. 97-82 is filed with the Commission within two years after the last payment of medical compensation when no other compensation has been paid and when the employer's liability has not otherwise been established under this Article. The provisions of this subsection shall not limit the time otherwise allowed for the filing of a claim for compensation for occupational disease in G.S. 97-58, but in no event shall the time for filing a claim for compensation for occupational disease be less than the times provided herein for filing a claim for an injury by accident.

(b) If any claim for compensation is hereafter made upon the theory that such claim or the injury upon which said claim is based is within the jurisdiction of the Industrial Commission under the provisions of this Article, and if the Commission, or the appellate courts on appeal, shall adjudge that such claim is not within the Article, the claimant, or if he dies, his personal representative, shall have one year after the rendition of a final judgment in the case within which to commence an action at law.

(c) When all claims and reports required by this Article have been filed, and the cases and records of which they are a part have been closed by proper reports, receipts, awards or orders, these records, may after five years in the discretion of the Commission, with and by the authorization and approval of the Department of Cultural Resources, be destroyed by burning or otherwise. (1929, c. 120, s. 24; 1933, c. 449, s. 2; 1945, c. 766; 1955, c. 1026, s. 12; 1973, c. 476, s. 48; c. 1060, s. 1; 1991, c. 703, s. 8; 1993 (Reg. Sess., 1994), c. 679, s. 3.4.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.4, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, rewrote subsection (a).

CASE NOTES

Prerequisites to Equitable Estoppel. — Although defendant furniture company may have thought plaintiff's injuries would be covered by another insurer, neither bad faith, fraud nor intent to deceive is necessary before the doctrine of equitable estoppel can be applied. Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

The basis for effecting equitable estoppel is the inconsistent position subsequently taken, rather than in the original conduct and where plaintiff was misled to her detriment, it was under such circumstances that application of the doctrine of equitable estoppel was appropriate. Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

§ 97-25. Medical treatment and supplies.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

I. In General.
II. What Treatment Must Be Provided.

I. IN GENERAL.

The legislature intended (1) that medical compensation, including hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in this section; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended that the Industrial Commission's authority under this section be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

No "Change of Condition" Requirement. — Nothing in the language of this section implies that the "change of condition" requirement of § 97-47 applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The complete absence of an express or implied reference in this section to any "change of condition" requirement, in addition to this section's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Construction with § 97-47. — Because "compensation" does not include the payment of medical expenses, the provisions of § 97-47 do not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of this section. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Applied in Braswell v. Pitt County Mem. Hosp., 106 N.C. App. 1, 415 S.E.2d 86 (1992); Maynor v. Sayles Biltmore Bleacheries, 116 N.C. App. 485, 448 S.E.2d 382 (1994).

Cited in Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994).

II. WHAT TREATMENT MUST BE PROVIDED.

Relief from pain is a legitimate aspect of the "relief" anticipated by future medical treatment under this section. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

Relief from pain constituted "relief" as that term was used in this section prior to 1991 amendment. Radica v. Carolina Mills, 113 N.C. App. 440, 439 S.E.2d 185 (1994).

Pre-existing Condition. — Where a North Carolina Industrial Commission finding that plaintiff's worsening lumbar spine condition was directly related to his original back condition and not caused by a work related accident was supported by competent evidence, the Commission did not err in denying plaintiff's claim for additional compensation and medical treatment. Pittman v. Thomas & Howard, 122 N.C. App. 124, 468 S.E.2d 283 (1996).

Future Medical Expenses for Procedure to Relieve Pain. — Defendants were required to pay for plaintiff's back surgery and related medical expenses as long as the surgery would give plaintiff relief, regardless of whether such surgery would lessen the period of disability or effect a cure for his injury, where, plaintiff contended the surgery would relieve a substantial portion of the pain he was suffering. Simon v. Triangle Materials, Inc., 106 N.C. App. 39, 415 S.E.2d 105, cert. denied, 332 N.C. 347, 421 S.E.2d 154 (1992).

§ 97-25.1. Limitation of duration of medical compensation.

The right to medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation unless, prior to the expiration of this period, either: (i) the employee files with the Commission an application for additional medical compensation which is thereafter approved by the Commission, or (ii) the Commission on its own motion orders additional medical compensation. If the Commission determines that there is a substantial risk of the necessity of future medical compensation, the Commission shall provide by order for payment of future necessary medical compensation. (1993 (Reg. Sess., 1994), c. 679, s. 2.5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994) c. 679, s. 11.1(g), made this section effective upon ratification, and applicable to injuries by accident occurring on or after that date. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.2. Managed care organizations.

The requirements of G.S. 97-25 may be satisfied by contracting with a managed care organization. Notwithstanding any other provision of this Article, if an employer or carrier contracts with a managed care organization for medical services pursuant to this Article, those employees who are covered by the contract with the managed care organization shall receive medical services for a condition for which the employer has accepted liability or authorized treatment under this Article in the manner prescribed by the contract and in accordance with the managed care organization's certificate of authority; provided that the contract complies with rules adopted by the Commission, consistent with this Article, governing managed care organizations. An employee must exhaust all dispute resolution procedures of a managed care organization before applying to the Commission for review of any issue related to medical services compensable under this Article. Once application to the Commission has been made, the employee shall be entitled to an examination by a duly qualified physician or surgeon in the same manner as provided by G.S. 97-27.

If an employee's medical services are provided through a managed care organization pursuant to this section, subject to the rules of the managed care organization, the employee shall select the attending physician from those physicians who are members of the managed care organization's panel, and may subsequently change attending physicians once within the group of physicians who are members of the managed care organization's panel without approval from the employer or insurer. Additional changes in the attending physician or any change to a physician or examination by a physician not a member of the insurer's managed care organization's panel shall only be made pursuant to the organization's contract or upon reasonable grounds by order of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 2.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.3. Preauthorization.

(a) An insurer may require preauthorization for inpatient admission to a hospital, inpatient admission to a treatment center, and inpatient or outpatient surgery. The insurer's preauthorization requirement must adhere to the following standards:

(1) The insurer may require no more than 10 days advance notice of the inpatient admission or surgery.

(2) The insurer must respond to a request for preauthorization within two business days of the request.

(3) The insurer shall review the need for the inpatient admission or surgery and may require the employee to submit to an independent medical examination as provided in G.S. 97-27(a). This examination must be completed and the insurer must make its determination on the request for preauthorization within seven days of the date of the request unless this time is extended by the Commission for good cause.

(4) The insurer shall document its review findings and determination in writing and shall provide a copy of the findings and determination to the employee and the employee's attending physician, and, if applicable, to the hospital or treatment center.

(5) The insurer shall authorize the inpatient admission or surgery when it requires the employee to submit to a medical examination as provided in G.S. 97-27(a) and the examining physician concurs with the original recommendation for the inpatient admission or surgery. The insurer shall also authorize the inpatient admission or surgery when the employee obtains a second opinion from a physician approved by the insurer or the Commission, and the second physician concurs with the original recommendation for the inpatient admission or surgery. However, the insurer shall not be required by this subdivision to authorize the inpatient admission or surgery if it denies liability under this Article for the particular medical condition for which the services are sought.

(6) Except as provided in subsection (c) of this section, the insurer may reduce its reimbursement of the provider's eligible charges under this Article by up to fifty percent (50%) if the insurer has notified the provider in writing of its preauthorization requirement and the provider failed to timely obtain preauthorization. The employee shall not be liable for the balance of the charges.

(7) The insurer shall adhere to all other procedures for preauthorization prescribed by the Commission.

(b) An insurer may not impose a preauthorization requirement for the following:

(1) Emergency services;

(2) Services rendered in the diagnosis or treatment of an injury or illness for which the insurer has not admitted liability or authorized payment for treatment pursuant to this Article; and

(3) Services rendered in the diagnosis and treatment of a specific medical condition for which the insurer has not admitted liability or authorized payment for treatment

although the insurer admits the employee has suffered a compensable injury or illness.

(c) The Commission may, upon reasonable grounds, upon the request of the employee or provider, authorize treatment for which preauthorization is otherwise required by this section but was not obtained if the Commission determines that the treatment is or was reasonably required to effect a cure or give relief.

(d) The Commission may adopt procedures governing the use of preauthorization requirements and expeditious review of preauthorization denials.

(e) A managed care organization may impose preauthorization requirements consistent with the provisions of Chapter 58 of the General Statutes.

(f) A provider that refuses to treat an employee for other than an emergency medical condition because preauthorization has not been obtained shall be immune from liability in any civil action for the refusal to treat the employee because of lack of preauthorization. (1993 (Reg. Sess., 1994), c. 679, s. 2.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-25.4. Utilization guidelines for medical treatment.

(a) The Commission may adopt utilization rules and guidelines, consistent with this Article, for medical care and medical rehabilitation services, other than those services provided by managed care organizations pursuant to G.S. 97-25.2, including, but not limited to, necessary palliative care, physical therapy treatment, psychological therapy, chiropractic services, medical rehabilitation services, and attendant care. The Commission's rules and guidelines shall ensure that injured employees are provided the services and care intended by this Article and that medical costs are adequately contained. In developing the rules and guidelines, the Commission may consider, among other factors, the practice guidelines adopted by the boards and associations representing medical and rehabilitation professionals.

(b) Palliative care rules or guidelines adopted by the Commission may require that the provider (i) supply to the employer a treatment plan, including a schedule of measurable objectives, a projected termination date for treatment, and an estimated cost of services, and (ii) obtain preauthorization from the employer, not inconsistent with the provisions of G.S. 97-25.3. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-25.5. Utilization guidelines for vocational and other rehabilitation.

The Commission may adopt utilization rules and guidelines, consistent with this Article, for vocational rehabilitation services and other types of rehabilitation services. In developing the rules and guidelines, the Commission may consider, among other factors, the practice and treatment guidelines adopted by professional rehabilitation associations and organizations. (1993 (Reg. Sess., 1994), c. 679, s. 2.4.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(d), made this section effective September 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-26. Fees allowed for medical treatment; malpractice of physician.

(a) Fee Schedule. — The Commission shall adopt a schedule of maximum fees for medical compensation, except as provided in subsection (b) of this section, and shall periodically review the schedule and make revisions pursuant to the provisions of this Article.

The fees adopted by the Commission in its schedule shall be adequate to ensure that (i) injured workers are provided the standard of services and care intended by this Chapter, (ii) providers are reimbursed reasonable fees for providing these services, and (iii) medical costs are adequately contained.

Prior to adoption of a fee schedule, the Commission shall publish notice of its intent to adopt the schedule in the North Carolina Register and hold a public hearing. The published notice shall include the location, date and time of the public hearing, the proposed effective date of the fee schedule, the period of time during which the Commission will receive written comments on the proposed schedule, and the person to whom comments and questions should be directed. In addition to publication in the North Carolina Register, the notice may be mailed to parties who have requested notice of the fee schedule hearing. The public hearing shall be held no earlier than 15 days after the publication of the notice. The Commission shall receive written comments for at least 30 days or until the date of the public hearing, whichever is later, after which the Commission may adopt the fee schedule.

The Commission may consider any and all reimbursement systems and plans in establishing its fee schedule, including, but not limited to, the Teachers' and State Employees' Comprehensive Major Medical Plan (hereinafter, "State Plan"), Blue Cross and Blue Shield, and any other private or governmental plans. The Commission may also consider any and all reimbursement methodologies, including, but not limited to, the use of current procedural terminology ("CPT") codes, diagnostic-related groupings ("DRGs"), per diem rates, capitated payments, and resource-based relative-value system ("RBRVS") payments. The Commission may consider statewide fee averages, geographical and community variations in provider costs, and any other factors affecting provider costs.

An appeal from a decision of the Commission establishing a fee schedule, by any party aggrieved thereby, shall be to the North Carolina Court of Appeals. The decision of the Commission shall be affirmed if supported by substantial evidence. For the purposes of the appeal, the Commission is a party.

(b) **(Effective until June 30, 1997 — see editor's note)** Hospital Fees. — Payment for medical compensation rendered by a hospital participating in the State Plan, except as otherwise provided herein, shall be equal to the payment the hospital receives for the same treatment and services under the State Plan, provided that such payment with respect to inpatient hospital services shall not be less than ninety percent (90%) nor more than one hundred percent (100%) of the hospital's itemized charges as shown on the UB-92 claim form. A hospital's itemized charges on the UB-92 claim form for workers' compensation services shall be the same as itemized charges for like services for all other payors during the period from April 1, 1996, through June 30, 1997. Payment for a particular type of medical compensation that is not covered under the State Plan shall be based on the allowable charge under the State Plan for comparable services or treatment, as determined by the Commission. Each hospital subject to the provisions of this subsection shall be reimbursed the amount provided for in this subsection unless it has agreed under contract with the insurer, managed care organization, or employer to accept a different amount or reimbursement methodology.

(b) **(Effective June 30, 1997 — see editor's note)** Hospital Fees. — Payment for medical compensation rendered by a hospital participating in the State Plan shall be equal to the payment the hospital receives for the same treatment and services under the State Plan. Payment for a particular type of medical compensation that is not covered under the State Plan shall be based on the allowable charge under the State Plan for comparable services or treatment, as determined by the Commission. Each hospital subject to the provisions of this subsection shall be reimbursed the amount provided for in this subsection unless it has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology.

(c) Maximum Reimbursement for Providers Under Subsection (a). — Each health care provider subject to the provisions of subsection (a) of this section shall be reimbursed the amount specified under the fee schedule unless the provider has agreed under contract with the insurer or managed care organization to accept a different amount or reimbursement methodology. In any instance in which neither the fee schedule nor a contractual fee applies, the maximum reimbursement to which a provider under subsection (a) is entitled under this Article is the usual, customary, and reasonable charge for the service or treatment rendered. In no event shall a provider under subsection (a) charge more than its usual fee for the service or treatment rendered.

(d) Information to Commission. — Each health care provider seeking reimbursement for medical compensation under this Article shall provide the Commission information requested by the Commission for the development of fee schedules and the determination of appropriate reimbursement.

(e) When Charges Submitted. — Health care providers shall submit charges to the insurer or managed care organization within 30 days of treatment, within 30 days after the end of the month during which multiple treatments were provided, or within such other reasonable period of time as allowed by the Commission. If an insurer or managed care organization disputes a portion of a health care provider's bill, it shall pay the uncontested portion of the bill and shall resolve disputes regarding the balance of the charges in accordance with this Article or its contractual arrangement.

(f) Repeating Diagnostic Tests. — A health care provider shall not authorize a diagnostic test previously conducted by another provider, unless the health care provider has reasonable grounds to believe a change in patient condition may have occurred or the quality of the prior test is doubted. The Commission may adopt rules establishing reasonable requirements for reports and records to be made available to other health care providers to prevent unnecessary duplication of tests and examinations. A health care provider that violates this subsection shall not be reimbursed for the costs associated with administering or analyzing the test.

(g) Direct Reimbursement. — The Commission may adopt rules to allow insurers and managed care organizations to review and reimburse charges for medical compensation without submitting the charges to the Commission for review and approval.

(h) Malpractice. — The employer shall not be liable in damages for malpractice by a physician or surgeon furnished by him pursuant to the provisions of this section, but the consequences of any such malpractice shall be deemed part of the injury resulting from the accident, and shall be compensated for as such. (1929, c. 120, s. 26; 1955, c. 1026, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 2.3; 1995 (Reg. Sess., 1996), c. 548, s. 1.)

Subsection (b) Set Out Twice. — The first version of subsection (b) set out above is effective until June 30, 1997. The second version of subsection (h) set out above is effective January 1, 1997.

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 11.1 provides in part: "This act is effective upon ratification, except as follows:

"(b) G.S. 97-26(b) and G.S. 97-26(f), as enacted in Section 2.3, become effective October 1, 1994. G.S. 97-26(a), as enacted in Section 2.3, is effective upon ratification [July 5, 1994] but the provisions of the third paragraph of said subsection shall not apply to the fee schedule in effect as of the date of ratification of this act [July 5, 1994]."

Session Laws 1995 (Reg. Sess., 1996), c. 548, s 2, effective April 1, 1996, provides that the amendment by Session Laws 1995 (Reg. Sess., 1996), c. 548, s. 1, expires on June 30, 1997, and its expiration applies to all hospital inpatient admissions occurring on or after that date.

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective April 1, 1996, and applicable to hospital inpatient admissions occurring on or after that date, in subsection (b) in the first sentence inserted "except as otherwise provided herein" and added at the end the language beginning "provided that such payment" and ending "shown on the #UB-92 claim form", added the present second sentence, and in the last sentence substituted "insurer, managed care organization, or employer" for "insurer or managed care organization." See editor's note for expiration date.

Legal Periodicals. —

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

This section contains the correct measure of employer liability for hospital charges. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended (1) that medical compensation, including hospital services provided by the employer, ordered by the Industrial Commission, provided pursuant to emergencies, or chosen by the employee, subject to the approval of the Commission, be limited by the terms and conditions contained in § 97-25; (2) that such medical compensation be reasonably required to effect a cure or give relief or tend to lessen the period of disability; and (3) that the employer not be charged more than his employee would have been had the employee paid for the services. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

The legislature intended that the Industrial Commission's authority under § 97-25 be limited to review and approval of hospital charges to ensure, first, that the employer is charged only for those reasonably required services, and, second, that the employer is not charged more for such services than the prevailing charge for the same or similar hospital service in the same community. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

§ 97-26.1. Fees for medical records and reports; expert witnesses.

The Commission may establish maximum fees for the following when related to a claim under this Article: (i) the searching, handling, copying, and mailing of medical records, (ii) the preparation of medical reports and narratives, and (iii) the presentation of expert testimony in a Commission proceeding. (1993 (Reg. Sess., 1994), c. 679, s. 5.6.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective upon ratification. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-27. Medical examination; facts not privileged; refusal to be examined suspends compensation; autopsy.

Legal Periodicals. —

For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

Refusal to Undergo Diagnostic Tests. —

The Workers' Compensation Statute does not compel the employer, nor the Industrial Commission, to rely upon one source of medical information, that provided by the injured plaintiff. The statute specifically suspends an injured employee's right to compensation should he or she refuse to submit to examination by a physician designated and paid for by the employer. Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992), cert. denied, 333 N.C. 461, 427 S.E.2d 618 (1993).

The Commission erred by admitting the deposition testimony of plaintiff's surgeon in light of the nonconsensual ex parte contact between defendant and plaintiff's surgeon. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996).

Cited in Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992); Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 97-29. Compensation rates for total incapacity.

Legal Periodicals. —

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

I. In General.
II. Permanent and Total Disability.

I. IN GENERAL.

Construction with § 97-31. —

Where plaintiff may have been entitled to permanent total disability benefits under this section, as well as permanent partial disability benefits under § 97-31 but under this section plaintiff would receive such benefits for as long as he remained totally disabled rather than 45 weeks, and claims employee assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits and his rights, in approving the Form 26 compensation agreement between plaintiff and defendants, the Industrial Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

The Industrial Commission is required to conduct a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act that an injured employee receive the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both this section and § 97-31 have the benefit of the more favorable remedy. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Inability to Obtain Future Employment. — Where an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist. Lackey v. R.L. Stowe Mills, Inc., 106 N.C. App. 658, 418 S.E.2d 517, cert. denied, 332 N.C. 345, 421 S.E.2d 150 (1992).

In order to prove disability the burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment; (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. Russell v. Lowes Prod. Distrib., 108 N.C. App. 762, 425 S.E.2d 454 (1993).

Burden of Proof. — A claimant who asserts that he is entitled to compensation under this section has the burden of proving that he is, as a result of the injury arising out of and in the course of his employment, totally unable to earn wages which in the same or any other employment. Burwell v. Winn-Dixie Raleigh, Inc., 114 N.C. App. 69, 441 S.E.2d 145 (1994).

Evidence of an employer's refusal to allow an employee to return to work because there was no "light" work available supports a finding that the employee is not capable of earning wages in the same employment. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Applied in Gilliam v. Perdue Farms, 112 N.C. App. 535, 435 S.E.2d 780 (1993).

Stated in Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Bowden v. Boling Co., 110 N.C. App. 226, 429 S.E.2d 394 (1993); Conklin v. Carolina Narrow Fabrics Co., 113 N.C. App. 542, 439 S.E.2d 239 (1994); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995).

II. PERMANENT AND TOTAL DISABILITY.

Combination of Compensable and Noncompensable Illnesses. — Where a claimant is rendered totally unable to earn wages, partially as a result of a compensable injury and partially as a result of a non-work-related medical condition, the claimant is entitled to an award for total disability under this section. Counts v. Black & Decker Corp., 121 N.C. App. 387, 465 S.E.2d 343 (1996).

There was competent evidence before the Industrial Commission to support its finding that plaintiff's work-related shoulder injury combined with her non-work-related arthritic condition to render her totally disabled. Counts v. Black & Decker Corp., 121 N.C. App. 387, 465 S.E.2d 343 (1996).

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Evidence of Total Disability Held Sufficient. — Evidence provided by plaintiff's treating physician, occupational therapists, psychological associates, and vocational rehabilitation specialists supported the Commission's finding that plaintiff was unable, as a result of injury sustained in the course and scope of his employment, to earn wages in his former employment or in any other employment. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Evidence of Total Disability Held Insufficient. — There was no evidence in the medical records submitted to the Commission that supported an award of permanent total disability benefits under this section. Salaam v. North Carolina DOT, 122 N.C. App. 83, 468 S.E.2d 536 (1996).

§ 97-30. Partial incapacity.

Legal Periodicals. —

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

Section 97-31 Compared. —

An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under this section, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in § 97-31. In fact, an employee who sustains both general and specific injuries may recover benefits under both this section and § 97-31. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Because plaintiff's presumption of post-injury diminished earning capacity was established by plaintiff and unrebutted by defendant, plaintiff was allowed to elect benefits pursuant to this section. Shaw v. UPS, 116 N.C. App. 598, 449 S.E.2d 50 (1994), aff'd per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995).

Employer's failure to tell employee about benefits provided under this section was not sufficient reason to set aside the award where employee-plaintiff entered into an agreement, accepted all the benefits from it, and chose not to contest it until almost two years after entering the agreement.

Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994).

§ 97-31. Schedule of injuries; rate and period of compensation.

Legal Periodicals. —

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

CASE NOTES

I. In General.
VII. Disfigurement.
IX. Important Organs.

I. IN GENERAL.

Maximum Medical Improvement. — The healing period ends when after a course of treatment and observation, the injury is discovered to be permanent and that fact is duly established; the point at which the injury has stabilized is often called "maximum medical improvement." Horne v. Universal Leaf Tobacco Processors, 119 N.C. App. 682, 459 S.E.2d 797 (1995).

A finding of maximum medical improvement is simply the prerequisite to a determination of the amount of any permanent disability under this section. Silver v. Roberts Welding Contractors, 117 N.C. App. 707, 453 S.E.2d 216 (1995).

Section Construed with § 97-29. — The Industrial Commission is required to conduct a full investigation and a determination that a Form 26 compensation agreement is fair and just, in order to assure that the settlement is in accord with the intent and purpose of the Workers' Compensation Act, that an injured employee receives the disability benefits to which he is entitled, and, particularly, that an employee qualifying for disability compensation under both § 97-29 and this section have the benefit of the more favorable remedy. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Where plaintiff may have been entitled to permanent total disability benefits under § 97-29, as well as permanent partial disability benefits under this section, but under § 97-29 plaintiff would receive such benefits for as long as he remained totally disabled rather than 45 weeks, and claims employee assumed, rather than determined, that plaintiff was knowledgeable about workers' compensation benefits and his rights, in approving the Form 26 compensation agreement between plaintiff and defendants, the Industrial Commission did not, as the statute requires, act in a judicial capacity to determine the fairness of the agreement. Vernon v. Steven L. Mabe Bldrs., 336 N.C. 425, 444 S.E.2d 191 (1994).

Award Under § 97-29 Upheld. — There was sufficient evidence to support award and the provision of vocational rehabilitation services where the Industrial Commission found that plaintiff was impaired as a result of his head injury and had yet to overcome resistance on the part of potential employers in order to obtain employment and required vocational rehabilitation to assist him in obtaining stable employment. Silver v. Roberts Welding Contractors, 117 N.C. App. 707, 453 S.E.2d 216 (1995).

Section Construed with § 97-30. — An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under § 97-30, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in this section. In fact, an employee who sustains both general and specific injuries may recover benefits under both

§ 97-30 and this section. Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

Section Construed with § 97-61.5. — The acceptance of benefits under § 97-61.5 does not necessarily preclude an award under subsection (24) of this section. Hicks v. Leviton Mfg. Co., 121 N.C. App. 453, 466 S.E.2d 78 (1996).

Partial Disability Term. — The term of partial disability, not the term of total and partial disability combined, is to last no longer than 300 weeks less the period of total disability; the 300-week maximum partial disability period includes the time during which temporary total disability is paid or is in addition to the time in which temporary total disability is paid. Brown v. Public Works Comm'n, — N.C. —, 470 S.E.2d 352 (1996).

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992); Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Benavides v. Summit Structures, Inc., 118 N.C. App. 645, 456 S.E.2d 339 (1995).

VII. DISFIGUREMENT.

Separate Awards to Be Entered in Cases Involving Facial and Bodily Disfigurement. — Under this section prior to amendment in 1987, in cases where there was both facial and bodily disfigurement, where Commission did not specify in its opinion separate award amounts for each category of disfigurement, but made one award to compensate the injured worker for both types of disfigurement, would be upheld. However, in view of the 1987 amendment, in future cases, separate awards should be entered in cases involving both types of disfigurement. Crews v. North Carolina DOT, 103 N.C. App. 372, 405 S.E.2d 595 (1991).

IX. IMPORTANT ORGANS.

Uterus. — Where plaintiff was permanently deprived of her uterus, an important organ, due to accidental injury, award of $15,000 for permanent loss of her uterus was held to be a proper exercise of discretion by the Industrial Commission. Alva v. Charlotte Mecklenburg Hosp. Auth., 117 N.C. App. 678, 453 S.E.2d 871 (1995).

Bladder. — Award of $11,000 for permanent damage to plaintiff's bladder was proper where there was credible and competent evidence that plaintiff's bladder, an important organ, was permanently damaged. Alva v. Charlotte Mecklenburg Hosp. Auth., 117 N.C. App. 678, 453 S.E.2d 871 (1995).

§ 97-31.1. (Effective January 1, 1997, contingent on approval of constitutional amendments) Effective date of legislative changes in benefits.

Every act of the General Assembly that changes the benefits enumerated in this Chapter shall become law no later than June 1 and shall have an effective date of no earlier than January 1 of the year after which it is ratified. (1981, c. 521, s. 3; 1995, c. 20, s. 11.)

For this section as in effect until January 1, 1997, contingent on approval of constitutional amendments, see the main volume.

Editor's Note. — Session Laws 1995, c. 20, s. 17 provides that sections 1 through 16 of this act shall become effective only if the constitutional amendments proposed by Session Laws 1995, c. 5, ss. 1-2 are approved as provided by Session Laws 1995, c. 5, ss. 3-4, and if so approved, sections 1 through 16 shall become effective with respect to bills and joint resolutions passed in either house of the General Assembly on or after January 1, 1997.

Effect of Amendments. — The 1995 amendment, effective on or after January 1, 1997, but only if constitutional amendments proposed by 1995, c. 5. ss. 1-2 are approved, substituted "become law" for "have a ratification date of".

§ 97-32. Refusal of injured employee to accept suitable employment as suspending compensation.

CASE NOTES

Quoted in Benavides v. Summit Structures, Inc., 118 N.C. App. 645, 456 S.E.2d 339 (1995).

Cited in Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

§ 97-32.1. Trial return to work.

Notwithstanding the provisions of G.S. 97-32, an employee may attempt a trial return to work for a period not to exceed nine months. During a trial return to work period, the employee shall be paid any compensation which may be owed for partial disability pursuant to G.S. 97-30. If the trial return to work is unsuccessful, the employee's right to continuing compensation under G.S. 97-29 shall be unimpaired unless terminated or suspended thereafter pursuant to the provisions of this Article. (1993 (Reg. Sess., 1994), c. 679, s. 4.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(a) made this section effective October 1, 1994, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

§ 97-33. Prorating in event of earlier disability or injury.

CASE NOTES

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

§ 97-35. How compensation paid for two injuries; employer liable only for subsequent injury.

CASE NOTES

When Apportionment Not Permitted. — Apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. Errante v. Cumberland County Solid Waste Mgt., 106 N.C. App. 114, 415 S.E.2d 583 (1992).

Stated in Gray v. Carolina Freight Carriers, Inc., 105 N.C. App. 480, 414 S.E.2d 102 (1992).

§ 97-38. Where death results proximately from compensable injury or occupational disease; dependents; burial expenses; compensation to aliens; election by partial dependents.

CASE NOTES

I. In General.
II. Dependents.

I. IN GENERAL.

The express language of this section fixes the rights and liabilities at the time of the employee's death, providing that where there is only one wholly dependent person at the time of decedent's death, all of the death benefits be paid to that person. Allen v. Piedmond Transp. Servs., Inc., 116 N.C. App. 234, 447 S.E.2d 835 (1994).

Applied in Cockrell v. Evans Lumber Co., 103 N.C. App. 359, 407 S.E.2d 248 (1991).

Cited in Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994); Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995).

II. DEPENDENTS.

Legal Adoption Not Finalized. — Where adoption proceedings had begun but were not finalized, the minor plaintiff was not a child legally adopted prior to the injury of the employee. Lennon v. Cumberland County, 119 N.C. App. 319, 458 S.E.2d 240 (1995).

§ 97-39. Widow, widower, or child to be conclusively presumed to be dependent; other cases determined upon facts; division of death benefits among those wholly dependent; when division among partially dependent.

CASE NOTES

Presumption of Dependency. — By statute, a widow is conclusively presumed to be wholly dependent for support upon the deceased employee, and shall receive benefits under the Workers' Compensation Act. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Spouse's Adultery Does Not Create an Exception to Statutes. — It is not within the authority of courts to create an exception to § 97-2(14) and this section based upon adultery by a spouse. To find that the legislature intended such an exception, it must be apparent in the statute. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

A wife's adulterous affair did not bar her from qualifying as her husband's widow under § 97-2(14) or this section. Rogers v. University Motor Inn, 103 N.C. App. 456, 405 S.E.2d 770 (1991).

Illegitimate Child Must Be Acknowledged. — To qualify for survivor's benefits under the act, an illegitimate child must be acknowledged in sufficient fashion by the father. Tucker v. City of Clinton, 120 N.C. App. 776, 463 S.E.2d 806 (1995).

Cited in Johnson v. Barnhill Contracting Co., 121 N.C. App. 55, 464 S.E.2d 313 (1995).

§ 97-40. Commutation and payment of compensation in absence of dependents; "next of kin" defined; commutation and distribution of compensation to partially dependent next of kin; payment in absence of both dependents and next of kin.

Subject to the provisions of G.S. 97-38, if the deceased employee leave neither whole nor partial dependents, then the compensation which would be payable under G.S. 97-38 to whole dependents shall be commuted to its present value and paid in a lump sum to the next of kin as herein defined. For purposes of this section and G.S. 97-38, "next of kin" shall include only child, father, mother, brother or sister of the deceased employee, including adult children or adult brothers or adult sisters of the deceased, but excluding a parent who has willfully abandoned the care and maintenance of his or her child and who has not resumed its care and maintenance at least one year prior to the first occurring of the majority or death of the child and continued its care and maintenance until its death or majority. For all such next of kin who are neither wholly nor partially dependent upon the deceased employee and who take under this section, the order of priority among them shall be governed by the general law applicable to the distribution of the personal estate of persons dying intestate. In the event of exclusion of a parent based on abandonment, the claim for compensation benefits shall be treated as though the abandoning parent had predeceased the employee. For all such next of kin who were also partially dependent on the deceased employee but who exercise the election provided for partial dependents by G.S. 97-38, the general law applicable to the distribution of the personal estate of persons dying intestate shall not apply and such person or persons upon the exercise of such election, shall be entitled, share and share alike, to the compensation provided in G.S. 97-38 for whole dependents commuted to its present value and paid in a lump sum.

If the deceased employee leaves neither whole dependents, partial dependents, nor next of kin as hereinabove defined, then no compensation shall be due or payable on account of the death of the deceased employee, except that the employer shall pay or cause to be paid the burial expenses of the deceased employee not exceeding two thousand dollars ($2,000) to the person or persons entitled thereto. (1929, c. 120, s. 40; 1931, c. 274, s. 5; c. 319; 1945, c. 766; 1953, c. 53, s. 2; c. 1135, s. 2; 1963, c. 604, s. 4; 1965, c. 419; 1967, c. 84, s. 5; 1971, c. 1179; 1981, c. 379; 1987, c. 729, s. 10.)

Editor's Note. — The section above is set out to correct an error in the second paragraph.

§ 97-40.1. Second Injury Fund.

(a) There is hereby created a fund to be known as the "Second Injury Fund," to be held and disbursed by the Industrial Commission as hereinafter provided.

For the purpose of providing money for said fund the Industrial Commission may assess against the employer or its insurance carrier the payment of not to exceed two hundred fifty dollars ($250.00) for the loss, or loss of use, of each minor member in every case of a permanent partial disability where there is such loss, and shall assess not to exceed seven hundred fifty dollars ($750.00) for fifty percent (50%) or more loss or loss of use of each major member, defined as back, foot, leg, hand, arm, eye, or hearing.

(b) The Industrial Commission shall disburse moneys from the Second Injury Fund in unusual cases of second injuries as follows:

(1) To pay additional compensation in cases of second injuries referred to in G.S. 97-33; provided, however, that the original injury and the subsequent injury were each at least twenty percent (20%) of the entire member; and, provided further, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the amount which would have been payable for both injuries had both been sustained in the subsequent accident.

(2) To pay additional compensation to an injured employee who has sustained permanent total disability in the manner referred to in the second paragraph of G.S. 97-35, which shall be in addition to the compensation awarded under said section; provided, however, that such additional compensation, when added to the compensation awarded under said section, shall not exceed the compensation for permanent total disability as provided for in G.S. 97-29.

(3) To pay compensation and medical expense in cases of permanent and total disability resulting from an injury to the brain or spinal cord in the manner and to the extent hereinafter provided.

The additional compensation and treatment expenses herein provided for shall be paid out of the Second Injury Fund exclusively and only to the extent to which the assets of such fund shall permit.

(c) In addition to payments for the purposes hereinabove set forth, the Industrial Commission may, in its discretion, make payments from said fund for the following purposes and under the following conditions:

(1) In any case in which total and permanent disability due to paralysis or loss of mental capacity has resulted from an injury to the brain or spinal cord, the Industrial Commission may, in its discretion enter an award and pay compensation and reasonable and necessary medical, nursing, hospital, institutional, equipment, and other treatment expenses from the Second Injury Fund during the life of the injured employee in cases where the injury giving rise to such disability occurred prior to July 1, 1953, and the last payment of compensation has been made subsequent to January 1, 1941. Such compensation and medical expense shall be paid only from April 4, 1947, and after the employer's liability for compensation and treatment ex-

pense has ended, and in every case in which the injury resulting in paralysis due to injury to the spinal cord occurred subsequent to April 4, 1947, and prior to July 1, 1953, the liability of the employer and his insurance carrier to pay compensation and medical expense during the life of the injured employee shall not be affected by this section.

(2) When compensation is allowed from the fund in any case under subdivision (1) of subsection (c), the Commission may in its discretion authorize payment of medical, nursing, hospital, equipment, and other treatment expenses incurred prior to the date compensation is allowed and after the employer's liability has ended if funds are reasonably available in the Second Injury Fund for such purpose after paying claims in cases of second injuries as specified in G.S. 97-33 and 97-35. Should the fund be insufficient to pay both compensation and treatment expenses, then the said expenses may, in the discretion of the Commission, be paid first and compensation thereafter according to the reasonable availability of funds in the fund. (1953, c. 1135, s. 2; 1957, c. 1396, s. 4; 1963, c. 450, s. 3; 1977, c. 457; 1991, c. 703, s. 11; 1993 (Reg. Sess., 1994), c. 679, s. 6.1.)

§ 97-42. Deduction of payments.

Payments made by the employer to the injured employee during the period of his disability, or to his dependents, which by the terms of this Article were not due and payable when made, may, subject to the approval of the Commission be deducted from the amount to be paid as compensation. Provided, that in the case of disability such deductions shall be made by shortening the period during which compensation must be paid, and not by reducing the amount of the weekly payment. Unless otherwise provided by the plan, when payments are made to an injured employee pursuant to an employer-funded salary continuation, disability or other income replacement plan, the deduction shall be calculated from payments made by the employer in each week during which compensation was due and payable, without any carry-forward or carry-back of credit for amounts paid in excess of the compensation rate in any given week. (1929, c. 120, s. 42; 1993 (Reg. Sess., 1994), c. 679, s. 3.7.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.7, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective September 1, 1994, and applicable to claims pending on or filed after that date.

CASE NOTES

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

Employer Should Not Be Denied Full Credit for Payments under Private Benefit Plan. —

In order for an employer to receive full credit for voluntary payments made to an injured employee, this section must be interpreted to mean that the amount of the deduction to which an employer, subject to the approval of the Commission, is entitled is the amount of the gross before-tax payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

The ordinary meaning of the language of this section allows an employer, subject to Commission approval, to receive a full dollar-for-dollar credit for all such payments. Evans v. AT & T Technologies, Inc., 331 N.C. 78, 418 S.E.2d 503 (1992).

An employer's entitlement to a credit, etc. —

Where defendant had not accepted claimant's injury as compensable under workers' compensation at the time the payments were made, nor had there been a determination of compensability by the Industrial Commission, the employer should be awarded a credit for these payments under this section. Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 468 S.E.2d 396 (1996).

§ 97-44. Lump sums.

CASE NOTES

Cited in Freeman v. Freeman, 107 N.C. App. 644, 421 S.E.2d 623 (1992).

§ 97-47. Change of condition; modification of award.

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For note, "The Fairness Requirement for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

I. In General.
II. Change of Condition.
III. Time Limitations.

I. IN GENERAL.

Section Not Applicable to Claims for Medical Expenses. — This section does not apply to an employee's right to claim medical payments under the Workers' Compensation Act. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Nothing in the language of § 97-25 implies that the "change of condition" requirement of this section applies to any request by an employee for the payment of his medical expenses by his employer. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

The proper procedure to end, diminish or increase a compensation award, etc. —

Where the Industrial Commission established an administrative procedure which allowed and condoned the termination of compensation by an employer and the employer's insurance carrier by the mere filing of an Industrial Commission created form (Form 24) notifying the Commission and the employee that compensation was being terminated, the Commission exceeded its authority. Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Applied in Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992); Jones v.Candler Mobile Village, 118 N.C. App. 719, 457 S.E.2d 315 (1995).

Cited in Daughtry v. Metric Constr. Co., 115 N.C. App. 354, 446 S.E.2d 590, cert. denied, 338 N.C. 515, 452 S.E.2d 808 (1994); Garrett v. Winfree, 120 N.C. App. 689, 463 S.E.2d 411 (1995).

II. CHANGE OF CONDITION.

A change in physical capacity to earn wages alone is sufficient to support an award of additional compensation for change of condition. Dinkins v. Federal Paper Bd. Co., 120 N.C. App. 192, 461 S.E.2d 909 (1995).

No "Change of Condition" Requirement for Claims for Medical Expenses. — The complete absence of an express or implied reference in § 97-25 to any "change of condition" requirement, in addition to that statute's clear language permitting the Industrial Commission to review medical treatment an employee is receiving and order further treatment at any time if an employee requests such a review, indicated that the legislature did not intend for an injured employee to make any showing of a change in condition before his employer would be required to pay for further medical services or treatment needed as a result of his compensable injury. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

It was not the intent of the legislature to require an injured employee to make any showing of a change in condition before his employer would be required to pay further medical services or treatment needed as a result of his compensable injury. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Compensation Does Not Include Medical Expenses. — Because "compensation" does not include the payment of medical expenses, this provision does not affect the Commission's grant or denial of an employee's request for payments of those expenses. The Commission's authority for requiring an employer to pay the medical expenses of an injured employee is established by the terms of § 97-25. Hyler v. GTE Prods. Co., 333 N.C. 258, 425 S.E.2d 698 (1993).

Change in Physical Capacity to Earn Wages Alone. — Where plaintiff was unable to find another job, due to his severe physical restrictions, coupled with his vocational and educational limits, because the record was rife with testimony that plaintiff suffered a compensable work-related injury which caused damage to the lumbar region of plaintiff's back, and Industrial Commission was able to determine that subsequent accident caused a "temporary flare-up" of plaintiff's pre-existing injury, it followed that plaintiff's change in wage earning capacity must have been a result of that same pre-existing injury; the Commission's findings and conclusions to the contrary were unsupported by the evidence and were therefore reversed. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Difference of Opinion. — Plaintiff did not experience a change of condition where one physician gave him a 15% disability rating, which he accepted, and a second physician gave him a 30% disability rating, where the second physician commented that the discrepancy was a difference of opinion. Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Change of Condition Attributed to Pre-existing Condition. — Where a North Carolina Industrial Commission finding that plaintiff's worsening lumbar spine condition was directly related to his original back condition and not caused by a work related accident was supported by competent evidence, the Commission did not err in denying plaintiff's claim for additional compensation and medical treatment. Pittman v. Thomas & Howard, 122 N.C. App. 124, 468 S.E.2d 283 (1996).

Evidence Insufficient to Show Depression Caused a Change in Circumstances. — While two doctors testified that plaintiff was depressed because of his injury, there was no evidence that this depression prevented plaintiff from working, which is essential in order to show a change of condition under this section. Jones v. Candler Mobile Village, 118 N.C. App. 719, 457 S.E.2d 315 (1995).

Modification of Award Upheld. — Where evidence before Industrial Commission showed that the continuous pain stemming from plaintiff's injury eventually rendered her totally incapable of earning any wages, this evidence was sufficient to justify the commission's finding and conclusion that a substantial change in plaintiff's back condition had occurred since the initial award. East v. Baby Diaper Servs., Inc., 119 N.C. App. 147, 457 S.E.2d 737 (1995).

III. TIME LIMITATIONS.

Time Period of Change Required. — Where the Industrial Commission found that plaintiff was unable to work for a period of time, yet there was no finding as to the time period during which plaintiff experienced this change a remand was needed since the commission's findings were not sufficient to determine the rights of the parties. Dinkins v. Federal Paper Bd. Co., 120 N.C. App. 192, 461 S.E.2d 909 (1995).

§ 97-47.1. Payment without prejudice; limitations period.

When the employer has paid compensation without prejudice but timely contested liability as provided in G.S. 97-18(d), the right, if any, to further indemnity compensation and medical compensation shall terminate two years after the employer's last payment of medical or indemnity compensation, whichever last occurs, unless the employee files with the Commission a claim for further compensation prior to the expiration of this period. (1993 (Reg. Sess., 1994), c. 679, s. 3.5.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(f), made this section effective January 1, 1995, and applicable to claims pending on or filed after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Subsection (d) of G.S. 97-18, referred to above, was redesignated as subsection (f).

§ 97-52. Occupational disease made compensable; "accident" defined.

CASE NOTES

Cited in Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-53. Occupational diseases enumerated; when due to exposure to chemicals.

CASE NOTES

I. In General.
II. Subdivision (13).
III. Particular Diseases.

I. IN GENERAL.

Appellate Review Limited. — Review of Industrial Commission decisions is limited to a determination of whether there was competent evidence before the Commission to support its findings and whether such findings support its legal conclusions; the Court of Appeals cannot substitute its judgment for that of the Commission. Findings of fact, when supported by competent evidence, are conclusive on appeal. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Proof of Inability to Earn. — Plaintiffs may prove they were incapable after injury of earning the same wages they had earned before injury in any other employment in one of four ways: (1) the production of medical evidence that they are physically or mentally, as consequence of the work related injury, incapable of work in any employment; (2) the production of evidence that they are capable of some work, but have, after a reasonable effort been unsuccessful in their effort to obtain employment; (3) the production of evidence that they are capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, or lack of education, to seek other employment; or (4) the production of evidence that they have obtained other employment at a wage less than that earned prior to the injury. Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

Cited in Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991); Walters v. Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995); Baker v. City of Sanford, 120 N.C. App. 783, 463 S.E.2d 559 (1995).

II. SUBDIVISION (13).

What Plaintiff Must Show Under Subdivision (13). —

The Supreme Court has rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment. Any evaluation of the workplace for the agent in question after claimant's departure would not quantify claimant's exposure, but would merely "guessimate" it. Since the degree of exposure does not need to be measured during claimant's employment, it should not need to be quantified in findings of fact, either. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The substance to which plaintiff was last injuriously exposed need not be in a substance known to cause the disease. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Proof of Causation Is Essential. —

Plaintiff did not meet the burden of showing a causal connection between her back injury and her employment with defendant. Thompson v. Tyson Foods, Inc., 119 N.C. App. 411, 458 S.E.2d 746 (1995).

Causal Connection May Be Established, etc. —

Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. Medical opinions given may be based either on personal knowledge or observation or on information supplied him by others, including the patient. Absolute medical certainty is not required. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission Was Not Required to Make Two Separate Findings Regarding Aggravation of Disease. — The terms "significantly contributing to" and "aggravated," regarding exposure to a substance and its effect on a claimant's health, are interchangeable. Therefore, where the Industrial Commission had determined that plaintiff's exposure to cotton dust did not significantly contribute to his disease, it was tantamount to a finding that his disease was not aggravated by his exposure to cotton dust. It was not necessary for the Commission to make two separate findings. Wilkins v. J.P. Stevens & Co., 100 N.C. App. 742, 398 S.E.2d 66 (1990), aff'd, 333 N.C. 449, 426 S.E.2d 675 (1993).

Factors in Determining Significance of Exposure. —

In accord with the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Explicit Findings Required. —

In accord with the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Claimant Has Burden of Proof. —

Claimant has the burden of proof, but if the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Respiratory surfaces of the lungs are "external contact surfaces" of the body, etc. —

Evidence offered was sufficient to support the Industrial Commission's findings that a spontaneous tear of the rotator cuff was an occupational disease within the meaning of subsection (13) of this section. Gibbs v. Leggett & Platt, Inc., 112 N.C. App. 103, 434 S.E.2d 653 (1993).

III. PARTICULAR DISEASES.

Tuberculosis — Plaintiff failed to show correlation between his work as a janitor and the development of tuberculosis, with the exception of his exposure to a coemployee with the disease, or that the nature of a janitorial job increased a person's risk of developing tuberculosis, for tuberculosis to be found to be an occupational disease under subdivision (13). Higgs v. Southeastern Cleaning Serv., — N.C. —, 470 S.E.2d 337 (1996).

Stress. — There was sufficient evidence to support the findings of the full commission that plaintiff suffered occupational stress as a result of her employment as a police officer and was entitled to workers' compensation benefits. Pulley v. City of Durham, 121 N.C. App. 688 468 S.E.2d 506 (1996).

§ 97-57. Employer liable.

CASE NOTES

Presumption Created by Section 97-57. — Section 97-57 creates an irrebuttable legal presumption that the last thirty days of work is the period of last injurious exposure. Thus, "an exposure which proximately augmented the disease to any extent, however slight" is deemed the last injurious exposure. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff does not have to establish that the conditions of his employment with the defendant caused or significantly contributed to his disease. He need only show that: (1) he has an occupational disease and (2) he was "last injuriously exposed to the hazards of such disease" in the defendant's employment. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

Plaintiff satisfied his burden of proof and was entitled to workers' compensation benefits where there was an irrebuttable legal presumption that the last thirty days of work subjecting the plaintiff to the hazards of asbestos is the period of last injurious exposure and the Industrial Commission held that plaintiff was exposed to the inhalation during the 48 days he worked for last employer, the defendant. Barber v. Babcock & Wilcox Constr. Co., 101 N.C. App. 564, 400 S.E.2d 735 (1991).

§ 97-58. Time limit for filing claims.

CASE NOTES

IV. Filing of Claims.

IV. FILING OF CLAIMS.

When Two-Year Limit Begins to Run. —

Two conditions must be met in order to start the two-year statute of limitations running against a claimant: (1) The employee must have suffered an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and (2) the employee has been informed by competent medical authority of the nature and work-related cause of the disease. Rutledge v. Stroh Cos., 105 N.C. App. 307, 412 S.E.2d 901 (1991), cert. denied, 331 N.C. 384, 417 S.E.2d 791 (1992).

§ 97-60. Examination of employees by advisory medical committee; designation of industries with dust hazards.

The compulsory examination of employees and prospective employees as herein provided applies only to persons engaged or about to engage in an occupation which has been found by the Industrial Commission to expose them to the hazards of asbestosis and/or silicosis. The Industrial Commission shall designate by order each industry found subject to any such hazard and shall notify the employers therein before such examinations are required. On and after March 26, 1935, it shall be the duty of every employer, in the conduct of whose business his employees or any of them are subjected to the hazard of asbestosis and/or silicosis, to provide prior to employment necessary examinations of all new employees for the purpose of ascertaining if any of them are in any degree affected by asbestosis and/or silicosis or peculiarly susceptible thereto; and every such employer shall from time to time, as ordered by the Industrial Commission, provide similar examinations for all of his employees whose employment exposes them to the hazards of asbestosis and/or silicosis. At least one member of the advisory medical committee or other physician designated by the Industrial Commission shall make such examinations or be present when any such examination is made. The refusal of an employee to submit to any such examination shall bar such employee from compensation or other benefits provided by this Article in the event of disablement and/or death resulting from exposure to the hazards of asbestosis and/or silicosis subsequent to such refusal. It shall be the duty of the Industrial Commission to make and/or order inspections of employments and to keep a record of all employments subjecting employees to the hazards of asbestosis and/or silicosis, and to notify the employer in any case where such hazard shall have been found to exist. The unreasonable failure of an employer to provide for any examination or his unreasonable refusal to permit any inspection herein authorized shall constitute a Class 1 misdemeanor and shall be punishable as such. (1935, c. 123; 1993, c. 539, s. 678; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 678, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 97-61.5. Hearing after first examination and report; removal of employee from hazardous occupation; compensation upon removal from hazardous occupation.

CASE NOTES

Section Construed with § 97-31. — The acceptance of benefits under this section does not necessarily preclude an award under § 97-31(24). Hicks v. Leviton Mfg. Co., 121 N.C. App. 453, 466 S.E.2d 78 (1996).

Calculation Based on Wage at Time of Diagnosis. — Plaintiff who was diagnosed with silicosis was entitled to compensation calculated based on his average weekly wage at the time he was diagnosed, not at the time of his last exposure or at the time he was "removed from the industry". Moore v. Standard Mineral Co., 122 N.C. App. 375, 469 S.E.2d 594 (1996).

§ 97-63. Period necessary for employee to be exposed.

CASE NOTES

Constitutionality. — This statute denies equal protection of the law under both the North Carolina Constitution and the United States Constitution in that it treats persons with asbestosis differently than persons with other occupational diseases and does so without any valid reason. Walters v. Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995).

§ 97-73. Expenses of making examinations.

(a) The Industrial Commission shall establish a schedule of fees for examinations conducted and reports made pursuant to G.S. 97-61.1 through 97-61.6 and 97-67 through 97-71. The fees shall be collected in accordance with rules adopted by the Industrial Commission.

(b) The Secretary of Environment, Health, and Natural Resources shall establish a schedule of fees for examinations conducted by the Department of Environment, Health, and Natural Resources pursuant to G.S. 97-60. The fees shall be collected in accordance with rules adopted by the Secretary of Environment, Health, and Natural Resources.

(c) Fees imposed pursuant to this section shall be collected from employers who by order of the Industrial Commission are determined to be subject to the hazards of asbestosis or silicosis. (1935, c. 123; 1955, c. 525, s. 8; 1991, c. 481, s. 2; 1991 (Reg. Sess., 1992), c. 1039, s. 2.)

§ 97-76. Inspection of hazardous employments; refusal to allow inspection made misdemeanor.

The Industrial Commission shall make inspections of employments for the purpose of ascertaining whether such employments, or any of them, are subject to the hazards of asbestosis and/or silicosis, and for the purpose of making studies and recommendations with a view to reducing and/or eliminating such hazards. The Industrial Commission, and/or any person selected by it, is authorized to enter upon the premises of employers where employments covered by this Article are being carried on to make examinations and studies as aforesaid. Any employer, or any officer or agent of any employer, who unreasonably prevents or obstructs any such examinations or study shall be guilty of a Class 1 misdemeanor. (1935, c. 123; 1993, c. 539, s. 679; 1994, Ex. Sess., c. 24, s. 14(c).)

Editor's Note. — Session Laws 1993, c. 539, s. 679, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

§ 97-77. North Carolina Industrial Commission created; members appointed by Governor; terms of office; chairman.

(a) There is hereby created a commission to be known as the North Carolina Industrial Commission, consisting of seven commissioners who shall devote their entire time to the duties of the Commission. The Governor shall appoint the members of the Commission, one for a term of two years, one for a term of four years, and one for a term of six years. Of the additional appointments made in 1994, one shall be for a term expiring June 30, 1996, one for a term expiring June 30, 1998, and two for terms expiring June 30, 2000. Upon the expiration of each term as above mentioned, the

Governor shall appoint a successor for a term of six years, and thereafter the term of office of each commissioner shall be six years. Not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employers, and not more than three appointees shall be persons who, on account of their previous vocations, employment or affiliations, can be classed as representatives of employees.

(b) One member, to be designated by the Governor, shall act as chairman. The chairman shall be the chief judicial officer and the chief executive officer of the Industrial Commission; such authority shall be exercised pursuant to the provisions of Chapter 126 of the General Statutes and the rules and policies of the State Personnel Commission. Notwithstanding the provisions of this Chapter, the chairman shall have such authority as is necessary to direct and oversee the Commission. The chairman may delegate any duties and responsibilities as may be necessary to ensure the proper management of the Industrial Commission. Notwithstanding the provisions of this Chapter, Chapter 143A, and Chapter 143B of the General Statutes, the chairman may hire or fire personnel and transfer personnel within the Industrial Commission.

The Governor may designate one vice-chairman from the remaining commissioners. The vice-chairman shall assume the powers of the chairman upon request of the chairman or when the chairman is absent for 24 hours or more. The authority delegated to the vice-chairman shall be relinquished immediately upon the return of the chairman or at the request of the chairman. (1929, c. 120, s. 51; 1931, c. 274, s. 8; 1991, c. 264, s. 1; 1993, c. 399, s. 3; 1993 (Reg. Sess., 1994), c. 769, s. 28.15(a).)

Editor's Note. —

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 2 provides: "This act shall be known as 'The Current Operations and Capital Improvements Appropriations Act of 1994.'"

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 43.5 is a severability clause.

Session Laws 1993 (Reg. Sess., 1994), c. 769, s. 28.15(a), which amended this section, was effective August 1, 1994, and applicable to appointments made on or after that date.

CASE NOTES

Cited in Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992); Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to this section.*

§ 97-77.1. (Expires July 1, 1997) Advisory council.

The chairman of the Commission may appoint an advisory council to advise the chairman on workers' compensation issues and other matters within the jurisdiction of the Commission. The members of the council shall serve at the pleasure of the chairman. The

§ 97-77.1 has a delayed expiration date. See notes.

members of the council shall not receive compensation for their service on the council. (1993 (Reg. Sess., 1994), c. 679, s. 5.1.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective September 1, 1994 and provides that this section expires July 1, 1997.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-78. Salaries and expenses; secretary and other clerical assistance; annual report.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-79. Offices and supplies; deputies with power to subpoena witnesses and to take testimony; meetings; hearings.

(a) The Commission shall be provided with adequate offices in which the records shall be kept and its official business transacted during regular business hours; it shall also be provided with necessary office furniture, stationery, and other supplies.

(b) The Commission may appoint deputies who shall have the same power as members of the Commission pursuant to G.S. 97-80 and the same power to take evidence, and enter orders, opinions, and awards based thereon as is possessed by the members of the Commission. The deputies shall be subject to the State Personnel System.

(c) The Commission or any member thereof may hold sessions at any place within the State as may be deemed necessary by the Commission.

(d) Hearings before the Commission shall be open to the public and shall be stenographically reported, and the Commission is authorized to contract for the reporting of such hearings. The Commission shall by regulation provide for the preparation of a record of the hearings and other proceedings. Notwithstanding the provisions of this subsection, informal hearings conducted pursuant to the provisions of G.S. 97-18.1, whether by telephone or in person, shall not be open to the public nor stenographically reported unless the Commission orders otherwise.

(e) The Commission, or any member thereof, or any deputy is authorized by appropriate order, to make additional parties plaintiff or defendant in any proceeding pending before the Commission when it is made to appear that such new party is either a necessary party or a proper party to a final determination of the proceeding.

(f) The Commission shall create an ombudsman program to assist unrepresented claimants, employers, and other parties, to enable them to protect their rights under this Article. In addition to other duties assigned by the Commission, the ombudsman shall meet with, or otherwise provide information to, injured employees, investigate complaints, and communicate with employers' insurance carriers and physicians at the request of the claimant. Assistance provided under this subsection shall not include representing the claimant in a compensation hearing. (1929, c. 120, s. 53; 1931, c. 274, s. 10; 1951, c. 1059, s. 7; 1955, c. 1026, s. 11; 1971, c. 527, s. 2; c. 1147, s. 2; 1981 (Reg. Sess., 1982), c. 1243, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 5.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 11.1 provides that the act is effective upon ratification (July 5, 1994), except as otherwise provided. Section 11.1(a) provides that the amendment to subsection (d) of this section becomes effective October 1, 1994, and applies to claims pending on or filed after that date, and s. 11.1(e) provides that the amendment to subsection (f) of this section becomes effective July 1, 1994.

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.*

§ 97-80. Rules and regulations; subpoena of witnesses; examination of books and records; depositions; costs.

(a) The Commission may make rules, not inconsistent with this Article, for carrying out the provisions of this Article. The Commission shall request the Office of State Budget and Management to prepare a fiscal note for a proposed new or amended rule that has a substantial economic impact, as defined in G.S. 150B-21.4(b1). The Commission shall not take final action on a proposed rule change that has a substantial economic impact until at least 60 days after the fiscal note has been prepared.

Processes, procedure, and discovery under this Article shall be as summary and simple as reasonably may be.

(b) The Commission or any member thereof, or any person deputized by it, shall have the power, for the purpose of this Article, to tax costs against the parties, to administer or cause to have administered oaths, to preserve order at hearings, to compel the attendance and testimony of witnesses, and to compel the production of books, papers, records, and other tangible things.

(c) **(See editor's note)** The Commission may order parties to participate in mediation, under rules substantially similar to those approved by the Supreme Court for use in the Superior Court division, except the Commission shall determine the manner in which payment of the costs of the mediated settlement conference is assessed.

(d) The Commission may order testimony to be taken by deposition and any party to a proceeding under this Article may, upon application to the Commission, which application shall set forth the materiality of the evidence to be given, cause the depositions of witnesses residing within or without the State to be taken, the costs to be taxed as other costs by Commission. Depositions ordered by the Commission upon application of a party shall be taken after giving the notice and in the manner prescribed by law for depositions in action at law, except that they shall be directed to the Commission, the commissioner, or the deputy commissioner before whom the proceedings may be pending.

(e) A subpoena may be issued by the Commission and served in accordance with G.S. 1A-1, Rule 45. Upon a motion, the Commission may quash a subpoena if it finds that the evidence the production of which is required does not relate to a matter in issue, the subpoena does not describe with sufficient particularity the evidence the production of which is required, or for any other reason sufficient in law the subpoena may be quashed. Each witness who appears in obedience to such subpoena of the Commission shall receive for attendance the fees and mileage for witnesses in civil cases in courts of the county where the hearing is held.

(f) The Commission may by rule provide for and limit the use of interrogatories and other forms of discovery, and it may provide reasonable sanctions for failure to comply with a Commission order compelling discovery.

(g) The Commission or any member or deputy thereof shall have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to hold a person in civil contempt, as provided thereunder, for failure to comply with an order of the Commission, Commission member, or deputy. A person held in civil contempt may appeal in the manner provided for appeals pursuant to G.S. 97-85 and G.S. 97-86. The provisions of G.S. 5A-24 shall not apply to appeals pursuant to this subsection.

(h) The Commission or any member or deputy thereof shall also have the same power as a judicial officer pursuant to Chapter 5A of the General Statutes to punish for criminal contempt, subject to the limitations thereunder, (i) for wilful behavior committed during the sitting of the commissioner or deputy commissioner and directly tending to interrupt the proceedings; (ii) for wilful disobedience of a lawful order of the Commission or a member or deputy thereof; or (iii) for wilful refusal to be sworn or affirmed as a witness, or, when so sworn or affirmed, wilful refusal to answer any legal and proper question when refusal is not legally justified. The Commission or any member or deputy thereof may issue an order of arrest as provided by G.S. 15A-305 when authorized by G.S. 5A-16 in connection with contempt proceedings. When the commissioner or deputy commissioner chooses not to proceed summarily pursuant to G.S. 5A-14, the proceedings shall be before a district court judge, and venue lies throughout the district where the order was issued directing the person charged to appear. A person found in criminal contempt may appeal in the manner provided for appeals in criminal actions to the superior court of the district in which the order of contempt was issued, and the appeal is by hearing de novo before a superior court judge. (1929, c. 120, s. 54; 1977, cc. 456, 505; 1981 (Reg. Sess., 1982), c. 1243, s. 2; 1993, c. 321, s. 25(b); c. 399, s. 1; 1993 (Reg. Sess., 1994), c. 679, ss. 5.3, 5.4; 1995, c. 507, s. 27.8(o); c. 509, s. 48.)

Editor's Note. —

Session Laws 1993, c. 321, s. 25(b) provided that, if HB 658 (Session Laws 1993, c. 399) were enacted, the first sentence of s. 4 of c. 399 would be amended by deleting "only if the General Assembly appropriates funds to implement the purpose of this act." However, this language is in the second sentence of section 5 of Chapter 399 and reads "only if the General Assembly appropriates funds to implement the purpose of these sections."

Session Laws 1993, c. 399, s. 4 provides: "The mediation program authorized by this act shall be evaluated under the direction of the Attorney General who shall file a written report on the evaluation of the program on or before May 1, 1995. One copy of the report shall be sent to the Speaker of the House of Representatives, one copy shall be sent to the President Pro Tempore of the Senate, and five copies shall be sent to the Legislative Services Commission for placement in the Legislative Library."

Session Laws 1993, c. 399, s. 5, which amended this section, provided that ss. 1, 2 and 4 of c. 399 would become effective October 1, 1993 only if the General Assembly appropriated funds to implement the purpose of these sections, and was applicable to claims pending on or filed after that date. Section 5 of c. 399, as amended by Session Laws 1995, c. 358, s. 8(a), c. 437, s. 6(a), and c. 467, s. 5(a), also provided that ss. 1, 2 and 4 would expire June 28, 1995, and applied to claims pending on or filed after the effective date of c. 399. The provision in Session Laws, c. 399, s. 5, that ss. 1, 2 and 4 would expire was deleted by Session Laws 1995, c. 507, s. 25.13.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which amended this section, in s. 5.4, as amended by Session Laws 1995, c. 358, s. 8(b), by Session Laws 1995, c. 437, s. 6(b), and by Session Laws 1995, c. 467, s. 5(b), provided: "Subsection (c) of G.S. 97-80 shall expire July 28, 1995, in accordance with the provisions of Chapter 399 of the 1993 Session Laws, unless the General Assembly amends Chapter 399 of the 1993 Session Laws to provide otherwise." Section 5 of Chapter 399 of the 1993 Session Laws was amended by Session Laws 1995, c. 507, s. 25.13, which deleted the language providing for the expiration of ss. 1, 2 and 4 of Session Laws 1993, c. 399.

Session Laws 1995, c. 507, which amended this section, in s. 27.8(z) provides that the amendment is effective December 1, 1995, and is applicable to all rules for which a notice of rule making is published in the North Carolina Register on or after that date and to rule and Building Code changes that are initiated on or after that date and that are not subject to the rule-making procedures set out in Article 2A of Chapter 150B of the General Statutes.

Session Laws 1995, c. 507, s. 1.1, provides that c. 507 shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 fiscal biennium."

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Effect of Amendments. — Session Laws 1995, c. 507, s. 27.8(o), effective December 1, 1995, added the second and last sentences of subsection (a).

Session Laws 1995, c. 509, s. 48, effective July 29, 1995, substituted "or for any other reason" for "of for any other reason" in subsection (e).

Legal Periodicals. —

For article, "Mediation of Industrial Commission Cases," see 17 Campbell L. Rev. 395 (1995).

CASE NOTES

I. In General.

I. IN GENERAL.

The Industrial Commission did not exceed its authority by the repeal of the Blue Cross Blue Shield rule. — Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Applied in Grantham v. R.G. Barry Corp., 115 N.C. App. 293, 444 S.E.2d 659 (1994).

§ 97-81. Blank forms and literature; statistics; safety provisions; accident reports; studies and investigations and recommendations to General Assembly; to cooperate with other agencies for prevention of injury.

(a) The Commission shall prepare and cause to be printed, and upon request furnish, free of charge to any employee or employer, such blank forms and literature as it shall deem requisite to facilitate or prompt the efficient administration of this Article. The Commission may authorize the use of electronic submission of forms and other means of transmittal of forms and notices when it deems appropriate.

(b) The Commission shall tabulate the accident reports received from employers in accordance with G.S. 97-92 and shall publish the same in the annual report of the Commission and as often as it may deem advisable, in such detailed or aggregate form as it may deem best. The name of the employer or employee shall not appear in such publications, and the employers' reports shall be private records of the Commission, and shall not be open for public inspection except for the inspection of the parties directly involved, and only to the extent of such interest, and except for inspection by the Department of Labor and other State or federal agencies pursuant to subsections (d) and (e) of this section. These reports shall not be used as evidence against any employer in any suit at law brought by any employee for the recovery of damages.

(c) The Commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Article, and shall from time to time make to the General Assembly and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(d) In making such studies and investigations the Commission shall:

(1) Cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Article, or with any State agency engaged in enforcing any laws to assure safety for employees, and

(2) Permit any such agency to have access to the records of the Commission.

In carrying out the provisions of this section the Commission or any officer or employee of the Commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or to enter any building, where an employment covered by this Article is being carried on, and to examine any tool, appliance, or machinery used in such employment.

(e) The Commission shall, upon written request from the Commissioner of Labor, provide from the Commission's records the following information from claims filed by employees, and from employer reports of injury to an employee required by G.S. 97-92:

(1) Name and business address of the employer;

(2) Type of business of the employer;

(3) Date the accident, illness, or injury occurred;

(4) Nature of the injury or disease reported; and
(5) Whether compensation for disability or medical expenses was paid to the injured employee.

Information provided to the Commissioner of Labor pursuant to this subsection, and to other State and federal agencies pursuant to subsection (d) of this section, shall be private and exempt from public inspection to the same extent that records of the Commission are so exempt. (1929, c. 120, s. 55; 1991 (Reg. Sess., 1992), c. 894, s. 2; 1993 (Reg. Sess., 1994), c. 679, s. 10.2.)

§ 97-82. Memorandum of agreement between employer and employee to be submitted to Commission on prescribed forms for approval; direct payment as award.

(a) If the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, they may enter into a memorandum of the agreement in the form prescribed by the Commission.

An agreement, however, shall be incorporated into a memorandum of agreement in regard to compensation: (i) for loss or permanent injury, disfigurement, or permanent and total disability under G.S. 97-31, (ii) for death from a compensable injury or occupational disease under G.S. 97-38, or (iii) when compensation under this Article is paid or payable to an employee who is incompetent or under 18 years of age.

The memorandum of agreement, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.

(b) If approved by the Commission, a memorandum of agreement shall for all purposes be enforceable by the court's decree as hereinafter specified. Payment pursuant to G.S. 97-18(b), or payment pursuant to G.S. 97-18(d) when compensability and liability are not contested prior to expiration of the period for payment without prejudice, shall constitute an award of the Commission on the question of compensability of and the insurer's liability for the injury for which payment was made. Compensation paid in these circumstances shall constitute payment of compensation pursuant to an award under this Article. (1929, c. 120, s. 56; 1993 (Reg. Sess., 1994), c. 679, s. 3.2.)

Editor's Note. — G.S. 97-18(d) referred to in subsection (b), was redesignated as subsection (f).

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.2, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, added "direct payment as award" in the section catch line, inserted the subsection designations, and rewrote the section, in part by adding the last two undesignated paragraphs of subsection (a) and by adding the last two sentences of subsection (b).

Legal Periodicals. —

For Survey of Developments in North Carolina Law (1992), see 71 N.C.L. Rev. 1893 (1993).

For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

For survey, "Vernon v. Stephen L. Mabe Builders: The Requirements of Fairness in Settlement Agreements Under the North Carolina Workers' Compensation Act," see 73 N.C.L. Rev. 2529 (1995).

For note, "The Fairness Requirement

for a Workers' Compensation Agreement — The Effect of Vernon v. Steven L. Mabe Builders," see 17 Campbell L. Rev. 521 (1995).

CASE NOTES

And Approved Settlements Are Enforceable by Court Decree. —

An agreement for the payment of compensation approved by the Commission is enforceable by a court decree. Dalton v. Anvil Knitwear, 119 N.C. App. 275, 458 S.E.2d 251 (1995).

Commission May Not Set Aside a Duly Executed Agreement. — Absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Industrial Commission may not set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with § 97-17 and this section. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission was immaterial. Glenn v. McDonald's, 109 N.C. App. 45, 425 S.E.2d 727 (1993).

Cited in Vernon v. Steven L. Mabe Bldrs., 110 N.C. App. 552, 430 S.E.2d 676 (1993).

§ 97-83. Commission is to make award after hearing.

If the employer and the injured employee or his dependents fail to reach an agreement in regard to benefits under this Article within 14 days after the employer has written or actual notice of the injury or death, or upon the arising of a dispute under this Article, either party may make application to the Commission for a hearing in regard to the matters at issue, and for a ruling thereon.

Immediately after such application has been received the Commission shall set the date of a hearing, which shall he held as soon as practicable and shall notify the parties at issue of the time and place of such hearing. The hearing or hearings shall be held in the city or county where the injury occurred, unless otherwise authorized by the Commission. (1929, c. 120, s. 57; 1955, c. 1026, s. 12½; 1977, c. 743; 1993 (Reg. Sess., 1994), c. 679, s. 3.3.)

Effect of Amendments. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 3.3, "The Workers' Compensation Reform Act of 1994," effective January 1, 1995, and applicable to claims pending on or filed after that date, deleted "In event of disagreement" at the beginning of the section catchline, and rewrote the section.

CASE NOTES

Cited in Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994); Phillips v. U.S. Air, Inc., 120 N.C. App. 538, 463 S.E.2d 259 (1995); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

§ 97-83.1. Facilities for hearings; security.

The senior resident superior court judge shall provide suitable facilities for the conduct of hearings under this Article in the county or counties within the judge's district at the time the Commission schedules hearings therein. The senior resident superior court judge shall, to the extent the judge determines necessary and practicable, provide or arrange for security at Commission hearings upon the request of a member or deputy of the Commission. (1993 (Reg. Sess., 1994), c. 679, s. 5.7.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1, made this section effective upon ratification. The act was ratified July 5, 1994.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-84. Determination of disputes by Commission or deputy.

CASE NOTES

Deputy Commissioner May Set Aside Opinion and Award. — Where, in order to allow defendants to depose a physician, the Deputy Commissioner entered an order to keep the record open, but before defendants had an opportunity to depose the physician, the Deputy Commissioner entered an Opinion and Award, this Act vested the Deputy Commissioner with the inherent authority to set aside his Opinion and Award once informed of the omission of the physician's testimony. Plummer v. Henderson Storage Co., 118 N.C. App. 727, 456 S.E.2d 886 (1995).

Quoted in Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

Cited in Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

§ 97-85. Review of award.

CASE NOTES

Deputy Commissioner's Findings of Fact Not Conclusive. — The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Upon appeal from a deputy commissioner's award, the Commission may receive further evidence regardless of whether it was newly discovered evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may weigh the evidence presented to the deputy commissioner and make its own determination as to the weight and credibility of the evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Failure of Commission to Review Evidence. — Without the depositions containing the medical evidence necessary to resolve the issues, the full Commission could not have determined what issues might have been raised by the evidence; therefore, before the full Commission attempted to address the merits of plaintiff's claim it should have requested the parties to submit the missing depositions. Slatton v. Metro Air Conditioning, Inc., 117 N.C. App. 226, 450 S.E.2d 550 (1994).

Plenary Powers of Commission to Review Awards. —

In accord with second paragraph in the main volume. See Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Commission to Decide All Matters in Controversy. — When the matter is "appealed" to the full commission pursuant to this section, it is the duty and responsibility of the full commission to decide all of the matters in controversy between the parties. Viergegge v. North Carolina State Univ., 105 N.C. App. 633, 414 S.E.2d 771 (1992).

Substitution of Commissioners on Panel. — Although there is no express statutory authority for the substitution of two Commissioners, neither is there a statutory provision in the Workers' Compensation Act expressly prohibiting such action, and if the legislature intended such restrictions on the Commissioner's authority, they would have expressly provided for such. Poe v. Raleigh/Durham Airport Auth., 121 N.C. App. 117, 464 S.E.2d 689 (1995).

Construction with Other Sections. — Where plaintiff's motion for reconsideration was made after the 15 days allowed under this section, Rule 60(b) merely requires that a motion for relief from the judgment be filed within a reasonable time. Thus, the Commission should have considered the motion as a Rule 60(b) motion for relief from the judgment. Jones v. Yates Motor Co., 121 N.C. App. 84, 464 S.E.2d 479 (1995).

Taking of Additional Evidence on Review. —

The party against whom an award has been made does not have a substantive right to require the Full Commission to hear new or additional testimony. It may, and should, do so if the due administration of justice requires. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

The Commission's power to receive additional evidence is a plenary power to be exercised in the sound discretion of the Commission. Moore v. Davis Auto Serv., 118 N.C. App. 624, 456 S.E.2d 847 (1995).

Commission may decide to exclude evidence which it has previously seen fit to hear, where the decision to take additional evidence is discretionary in nature and neither party has put forth good cause for such evidence to be considered. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Where it was within the Commission's power to ask for additional medical evidence, it was also within its power to exclude such evidence. Keel v. H & V, Inc., 107 N.C. App. 536, 421 S.E.2d 362 (1992).

Denial of Motion Upheld. — Where new evidence, testimony by a private investigator, was the same type of evidence that defendants introduced at the first hearing and the testimony did not provide any new revelations regarding plaintiff's disability, defendants suffered no prejudice by the Commission's denial of their motion to consider the new evidence. Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

Waiver of Right to Remand. — Where plaintiff had not assigned as error the failure of the Industrial Commission to afford him the review to which he was entitled under this section, and where plaintiff failed to argue that he was prejudiced in any way by any error upon the part of the full Commission, remand was not required. Faircloth v. North Carolina DOT, 106 N.C. App. 303, 416 S.E.2d 409 (1992).

Failure of Commission to Make Findings and Conclusions. — The Industrial Commission failed to carry out its statutory duties pursuant to this section by not making its own findings of fact and conclusions of law to support its disposition of plaintiff's claim. However, despite the failure of the Commission to make its own findings and conclusions, there was no prejudice to plaintiff. Jauregui v. Carolina Vegetables, 112 N.C. App. 593, 436 S.E.2d 268 (1993).

For preferred format of Industrial Commission's review of awards by deputy commissioner, see Crump v. Independence Nissan, 112 N.C. App. 587, 436 S.E.2d 589 (1993).

Excusable Neglect. — The commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

Applied in Glynn v. Pepcom Indus., Inc., 122 N.C. App. 348, 469 S.E.2d 588 (1996).

Quoted in Agee v. Thomasville Furn. Prods., 119 N.C. App. 77, 457 S.E.2d 886 (1995).

Stated in Pernell v. Piedmont Circuits, 104 N.C. App. 289, 409 S.E.2d 618 (1991).

Cited in Hardin v. Venture Constr. Co., 107 N.C. App. 758, 421 S.E.2d 601 (1992); Brewington v. North Carolina Dep't of Cor., 111 N.C. App. 833, 433 S.E.2d 798 (1993); Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. *— The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded in light of the 1991 amendment to § 97-77.*

§ 97-86. Award conclusive as to facts; appeal; certified questions of law.

The award of the Industrial Commission, as provided in G.S. 97-84, if not reviewed in due time, or an award of the Commission upon such review, as provided in G.S. 97-85, shall be conclusive and binding as to all questions of fact; but either party to the dispute may, within 30 days from the date of such award or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal from the decision of said Commission to the Court of Appeals for errors of law under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions. The procedure for the appeal shall be as provided by the rules of appellate procedure.

The Industrial Commission of its own motion may certify questions of law to the Court of Appeals for decision and determination by said Court. In case of an appeal from the decision of the Commission, or of a certification by said Commission of questions of law, to the Court of Appeals, said appeal or certification shall operate on a supersedeas except as provided in G.S. 97-86.1, and no employer shall be required to make payment of the award involved in said appeal or certification until the questions at issue therein shall have been fully determined in accordance with the provisions of this Article. If the employer is a noninsurer, then the appeal of such employer shall not act as a supersedeas and the plaintiff in such case shall have the same right to issue execution or to satisfy the award from the property of the employer pending the appeal as obtains to the successful party in an action in the superior court.

When any party to an appeal from an award of the Commission is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, any member of the Commission or any deputy commissioner shall enter an order allowing said party to appeal from the award of the Commission without giving security therefor. The party appealing from the judgment shall, within 30 days from the filing of the appeal from the award, make an affidavit that he is unable by reason of his poverty to give the security required by law. The request shall be passed upon and granted or denied by a member of the Commission or deputy commissioner within 20 days from receipt of the affidavit specified above. (1929, c. 120, s. 60; 1947, c. 823; 1957, c. 1396, s. 9; 1959, c. 863, s. 4; 1967, c. 669; 1971, c. 1189; 1975, c. 391, s. 15; 1977, c. 521, s. 1; 1993 (Reg. Sess., 1994), c. 679, s. 10.5; 1995 (Reg. Sess., 1996), c. 552, s. 1.)

Effect of Amendments. — The 1995 (Reg. Sess., 1996) amendment, effective October 1, 1996, and applicable to all appeals by indigents from an order of the Industrial Commission on or after that date, in the third paragraph, in the first sentence substituted "shall" for "may, in their discretion" preceding "enter an order", deleted "and that he is advised by a practicing attorney that there is error in the matters of law in the award of the Commission in said case" from the end of the second sentence, deleted the former third sentence, which read "The affidavit must be accompanied by a written statement from a practicing attorney of North Carolina that he has examined the affiant's case and is of the opinion that the decision of the Commission in said case is contrary to law," and deleted "and letter as" preceding "specified above" in the last sentence.

CASE NOTES

I. In General.
V. Scope of Review.

I. IN GENERAL.

Applied in Martin v. Piedmont Asphalt & Paving Co., 113 N.C. App. 121, 437 S.E.2d 696 (1993).

Quoted in Craver v. Dixie Furn. Co., 115 N.C. App. 570, 447 S.E.2d 789 (1994).

Cited in Goins v. Sanford Furn. Co., 105 N.C. App. 244, 412 S.E.2d 172 (1992); Blankley v. White Swan Uniform Rentals, 107 N.C. App. 751, 421 S.E.2d 603 (1992); Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992); McAnelly v. Wilson Pallet & Crate Co., 120 N.C. App. 127, 460 S.E.2d 894 (1995); Walters v. Blair, 120 N.C. App. 398, 462 S.E.2d 232 (1995); Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

V. SCOPE OF REVIEW.

Discretion to Consider Excusable Neglect. — The commission has the inherent power and authority, in its discretion, to consider defendant's motion for relief due to excusable neglect. Allen v. Food Lion, Inc., 117 N.C. App. 289, 450 S.E.2d 571 (1994).

Court May Determine Whether There Is Any Evidence to Support Commission's Findings. —

A review of the record indicated there was competent evidence to support the Commission's findings of fact, and the findings of fact justified the Commission's legal conclusions. Lowe v. BE & K Constr. Co., 121 N.C. App. 570, 468 S.E.2d 396 (1996).

OPINIONS OF ATTORNEY GENERAL

Editor's Note. — The Opinion of the Attorney General to J. Randolph Ward, Commissioner, North Carolina Industrial Commission, — N.C.A.G. — (November 8, 1990), annotated under this section in the main volume, should be disregarded, in light of the 1991 amendment to § 97-77.

§ 97-88. Expenses of appeals brought by insurers.

CASE NOTES

Construction with Other Sections. — This section and § 97-88.1 are supplementary in nature. This section allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. By contrast, an award of attorney's fees under § 97-88.1 requires that the litigation be brought, prosecuted, or defended without reasonable ground. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Fees Only for Portion of Case Attributable to Appeal. — Under this section, the Commission is empowered to award to the injured employee attorney's fees only for the portion of the case attributable to the insurer's appeal(s). Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under this section are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under GS 97.88.1, at the original hearing before the Commission. Brown v. Public Works Comm'n, — N.C. —, 470 S.E.2d 352 (1996).

Employee Was Entitled to Have Employer Pay Attorney's Fees. —

Where defendant appealed the initial award of benefits from the deputy commissioner to the full Commission and then to the Court of Appeals, and both affirmed the award of benefits, the requirements of this section were satisfied, and the Commission could award plaintiff the costs, including attorney's fees, of defending those appeals to the full Commission and to the Court of Appeals. Estes v. North Carolina State Univ., 117 N.C. App. 126, 449 S.E.2d 762 (1994).

Applied in Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

Cited in Andrews v. Fulcher Tire Sales & Serv., 120 N.C. App. 602, 463 S.E.2d 425 (1995).

§ 97-88.1. Attorney's fees at original hearing.

CASE NOTES

Purpose. — The purpose of this section is to prevent stubborn, unfounded litigiousness which is inharmonious with the primary purpose of the Workers' Compensation Act to provide compensation to injured employees. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Construction with Other Laws. — Section § 97-88 and this section are supplementary in nature. Section 97-88 allows an injured employee to move that its attorney's fees be paid whenever an insurer appeals to the Full Commission, or to a court of the appellate division, and the insurer is required to make payments to the injured employee. By contrast, an award of attorney's fees under this section requires that the litigation be brought, prosecuted, or defended without reasonable grounds. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Authority of Commission. — The Commission is authorized under this section to assess attorney's fees, and other costs, for the entire case, against a party prosecuting or defending a hearing without reasonable grounds. Troutman v. White & Simpson, Inc., 121 N.C. App. 48, 464 S.E.2d 481 (1995).

Fees Denied. — Because the parties brought, prosecuted, or defended this matter with reasonable grounds, the Commission properly declined to award attorney's fees in this matter. Shaw v. UPS, 116 N.C. App. 598, 449 S.E.2d 50 (1994), aff'd per curiam, 342 N.C. 189, 463 S.E.2d 78 (1995).

The statutory requirements for awarding attorney's fees to plaintiff under G.S. 97-88 are met when defendant appeals the Industrial Commission's order directing that defendant pay additional benefits to plaintiff and that order is affirmed; there is no proviso that "reasonable ground" be found lacking, which applies to fees sought under this section, at the original hearing before the Commission. Brown v. Public Works Comm'n, — N.C. —, 470 S.E.2d 352 (1996).

Applied in Poplin v. PPG Indus., 108 N.C. App. 55, 422 S.E.2d 353 (1992); Matthews v. Petroleum Tank Serv., Inc., 108 N.C. App. 259, 423 S.E.2d 532 (1992).

§ 97-88.2. Penalty for misrepresentation.

(a) Any person who willfully makes a false statement or representation of a material fact for the purpose of obtaining or denying any benefit or payment, or assisting another to obtain or deny any benefit or payment under this Article, shall be guilty of a Class 1 misdemeanor. The court may order restitution.

(b) The Commission shall:

(1) Perform investigations regarding all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, and refer possible criminal violations to the appropriate prosecutorial authorities;

(2) Conduct administrative violation proceedings; and

(3) Assess and collect penalties and restitution.

(c) Any person who threatens an employee with criminal prosecution under the provisions of subsection (a) of this section for the purpose of coercing or attempting to coerce the employee into agreeing to compensation under this Article shall be guilty of a Class 1 misdemeanor.

(d) The Commission shall not be liable in a civil action for any action made in good faith under this section, including the identification and referral of a person for investigation and prosecution for an alleged administrative violation or criminal offense. Any person, including, but not limited to, an attorney, an employee, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) The Commission shall report annually to the General Assembly on the number and disposition of investigations involving claimants, employers, insurance company officials, officials of third-party administrators, insurance agents, attorneys, health care providers, and vocational rehabilitation providers. (1993 (Reg. Sess., 1994), c. 679, s. 7.1; 1995, c. 507, s. 25(a).)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(c), made this section effective October 1, 1994, and applicable to violations occurring on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

Session Laws 1995, c. 507, s. 1.1, provides that this act shall be known and cited as the Expansion and Capital Improvements Appropriations Act of 1995.

Session Laws 1995, c. 507, s. 25(b), appropriated funds to the Department of Commerce for the 1995-96 and 1996-97 fiscal years, to be used for the North Carolina Industrial Commission to implement s. 25(a), which amended subsection (b) of this section.

Session Laws 1995, c. 507, s. 28.9, provides: "Except for statutory changes or other provisions that clearly indicate an intention to have effects beyond the 1995-97 biennium, the textual provisions of this act apply only to funds appropriated for, and activities occurring during, the 1995-97 fiscal biennium."

Session Laws 1995, c. 507, s. 28.12 is a severability clause.

Effect of Amendments. — The 1995 amendment, effective July 28, 1995, in subsection (b) deleted "refer all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers, to the Department of Insurance to" at the end of the introductory language, and added "regarding all cases of suspected fraud and all violations related to workers' compensation claims, by or against insurers or self-funded employers" in subdivision (b)(1).

§ 97-88.3. Penalty for health care providers.

(a) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed ten thousand dollars ($10,000):

(1) Submitting charges for health care that was not furnished;

(2) Fraudulently administering, providing, and attempting to collect for inappropriate or unnecessary treatment or services; or

(3) Violating the provisions of Article 28 of Chapter 90 of the General Statutes.

A penalty assessed by the Commission for a violation of subdivision (3) of this subsection is in addition to penalties assessed under G.S. 90-407.

(b) In addition to any liability under G.S. 97-88.2, any health care provider who willfully or intentionally undertakes the following acts is subject to an administrative penalty, assessed by the Commission, not to exceed one thousand dollars ($1,000):

(1) Failing or refusing to timely file required reports or records;
(2) Making unnecessary referrals; and
(3) Knowingly violating this Article or rules promulgated hereunder, including treatment guidelines, with intention to deceive or to gain improper advantage of a patient, employee, insurer, or the Commission.

(c) A health care provider who knowingly charges or otherwise holds an employee financially responsible for the cost of any services provided for a compensable injury under this Article is guilty of a Class 1 misdemeanor.

(d) Any person, including, but not limited to, an employer, an insurer, and an employee of an insurer, who in good faith comes forward with information under this section, shall not be liable in a civil action.

(e) Information relating to possible violations under this section shall be reported to the Commission which shall refer the same to the appropriate licensing or regulatory board or authority for the health care provider involved.

(f) A hospital that relies in good faith on a written order of a physician in performing health care services shall not be subject to an administrative penalty in violation of this section. (1993 (Reg. Sess., 1994), c. 679, s. 7.2.)

Editor's Note. — Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 11.1(c), made this section effective October 1, 1994, and applicable to violations occurring on or after that date.

Session Laws 1993 (Reg. Sess., 1994), c. 679, which enacted this section, in s. 1 provides: "This act shall be known as 'The Workers' Compensation Reform Act of 1994.'"

§ 97-90. Legal and medical fees to be approved by Commission; misdemeanor to receive fees unapproved by Commission, or to solicit employment in adjusting claims; agreement for fee or compensation.

(a) Fees for attorneys and charges of health care providers for medical compensation under this Article shall be subject to the approval of the Commission; but no physician or hospital or other medical facilities shall be entitled to collect fees from an employer or insurance carrier until he has made the reports required by the Commission in connection with the case. Except as provided in G.S. 97-26(g), a request for a specific prior approval to charge shall be submitted to the Commission for each such fee or charge.

(b) Any person (i) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the Commission or the court, as provided in subsection (c), or (ii) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a Class 1 misdemeanor.

(c) If an attorney has an agreement for fee or compensation under this Article, he shall file a copy or memorandum thereof with the hearing officer or Commission prior to the conclusion of the hearing. If the agreement is not considered unreasonable, the hearing officer or Commission shall approve it at the time of rendering decision. If the agreement is found to be unreasonable by the hearing officer or

Commission, the reasons therefor shall be given and what is considered to be reasonable fee allowed. If within five days after receipt of notice of such fee allowance, the attorney shall file notice of appeal to the full Commission, the full Commission shall hear the matter and determine whether or not the attorney's agreement as to a fee or the fee allowed is unreasonable. If the full Commission is of the opinion that such agreement or fee allowance is unreasonable and so finds, then the attorney may, by filing written notice of appeal within 10 days after receipt of such action by the full Commission, appeal to the senior resident judge of the superior court in the county in which the cause of action arose or in which the claimant resides; and upon such appeal said judge shall consider the matter and determine in his discretion the reasonableness of said agreement or fix the fee and direct an order to the Commission following his determination therein. The Commission shall, within 20 days after receipt of notice of appeal from its action concerning said agreement or allowance, transmit its findings and reasons as to its action concerning such agreement or allowance to the judge of the superior court designated in the notice of appeal. In all other cases where there is no agreement for fee or compensation, the attorney or claimant may, by filing written notice of appeal within five days after receipt of notice of action of the full Commission with respect to attorneys' fees, appeal to the senior resident judge of the superior court of the district of the county in which the cause arose or in which the claimant resides; and upon such appeal said judge shall consider the matter of such fee and determine in his discretion the attorneys' fees to be allowed in the cause. The Commission shall, within 20 days after notice of appeal has been filed, transmit its findings and reasons as to its action concerning such fee or compensation to the judge of the superior court designated in the notice of appeal; provided that the Commission shall in no event have any jurisdiction over any attorneys' fees in any third-party action. In any case in which an attorney appeals to the superior court on the question of attorneys' fees, the appealing attorney shall notify the Commission and the employee of any and all proceedings before the superior court on the appeal, and either or both may appear and be represented at such proceedings.

The Commission, in determining an allowance of attorneys' fees, shall examine the record to determine the services rendered. The factors which may be considered by the Commission in allowing a reasonable fee include, but are not limited to, the time invested, the amount involved, the results achieved, whether the fee is fixed or contingent, the customary fee for similar services, the experience and skill level of the attorney, and the nature of the attorney's services.

In making the allowance of attorneys' fees, the Commission shall, upon its own motion or that of an interested party, set forth findings sufficient to support the amount approved.

The Commission may deny or reduce an attorney's fees upon proof of solicitation of employment in violation of the Rules of Professional Conduct of the North Carolina State Bar.

(d) Provided, that nothing contained in this section shall prevent the collection of such reasonable fees of physicians and charges for hospitalization as may be recovered in an action, or embraced in settlement of a claim, against a third-party tort-feasor as described in G.S. 97-10.2.

(e) A health care provider shall not pursue a private claim against an employee for all or part of the costs of medical treatment provided to the employee by the provider unless the employee's claim or the treatment is finally adjudicated not to be compensable or the employee fails to request a hearing after denial of liability by the employer. Notwithstanding subsequent denial of liability or adjudication that the condition treated was not compensable, the insurer shall be liable as provided in G.S. 97-26 to providers whose services have been authorized by the insurer or employer. The statute of limitations applicable to a provider's claim for payment shall be tolled during the period the compensability of a claim or liability for particular treatment remains an issue in a compensation case. (1929, c. 120, s. 64; 1955, c. 1026, s. 4; 1959, cc. 1268, 1307; 1973, c. 520, s. 4; 1981, c. 521, s. 4; 1991, c. 703, s. 6; 1993, c. 539, s. 680; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 9.1.)

Editor's Note. —

Session Laws 1993, c. 539, s. 680, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Legal Periodicals. — For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

The authority to approve hospital charges under subsection (a) is provided to ensure that hospitals do not provide services not reasonably required to effect a cure or give relief or tend to lessen the period of disability, and that hospital charges therefor do not exceed the prevailing community charge described therein. Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n, 336 N.C. 200, 443 S.E.2d 716 (1994).

Less Than 100% Credit Was Within Commission's Authority. — Where the Commission's award allowed the defendant credit for payments that they had already made through their private insurer less only the plaintiff's reasonable attorney's fees calculated and based upon the amount of the entire worker's compensation award, the award was authorized by the statute since all credit given by the Commission in these circumstances is "subject to the approval" of the Industrial Commission. Church v. Baxter Travenol Labs., Inc., 104 N.C. App. 411, 409 S.E.2d 715 (1991).

§ 97-91. Commission to determine all questions.

Legal Periodicals. — For article, "Primary Issues in Compensation Litigation," see 17 Campbell L. Rev. 443 (1995).

CASE NOTES

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Abels v. Renfro Corp., 108 N.C. App. 135, 423 S.E.2d 479 (1992).

§ 97-92. Employer's record and report of accidents; records of Commission not open to public; supplementary report upon termination of disability; penalty for refusal to make report; when insurance carrier liable.

(a) Every employer shall hereafter keep a record of all injuries, fatal or otherwise, received by his employees in the course of their employment on blanks approved by the Commission. Within five days after the occurrence and knowledge thereof as provided in G.S. 97-22 of an injury to an employee, causing his absence from work for more than one day or charges for medical compensation exceeding the amount set by the Commission, a report thereof shall be made in writing and mailed or transmitted to the Commission in the form approved by the Commission for this purpose.

(b) The records of the Commission, insofar as they refer to accidents, injuries, and settlements shall not be open to the public, but only to the parties satisfying the Commission of their interest in such records and the right to inspect them, and to State and federal agencies pursuant to G.S. 97-81.

(c) Upon the termination of the disability of the injured employee, or if the disability extends beyond a period of 60 days, then, also, at the expiration of such period the employer shall make a supplementary report to the Commission on blanks to be procured from the Commission for the purpose.

(d) The said report shall contain the name, nature, and location of the business of the employer and name, age, sex, and wages and occupation of the injured employee, and shall state the date and hour of the accident causing injury, the nature and cause of the injury, and such other information as may be required by the Commission.

(e) Any employer who refuses or neglects to make the report required by this section shall be liable for a penalty of not less than five dollars ($5.00) and not more than twenty-five dollars ($25.00) for each refusal or neglect. The fine herein provided may be assessed by the Commission in an open hearing, with the right of review and appeal as in other cases. In the event the employer has transmitted the report to the insurance carrier for transmission by such insurance carrier to the Industrial Commission, the insurance carrier willfully neglecting or failing to transmit the report shall be liable for the said penalty.

(f) Any bill, report, application, and document of every nature and kind, which is required or permitted by Commission rules to be transmitted to the Commission by electronic media or is recorded among the Commission records on computer disk, optical disk, microfilm, or similar media and which is produced or reproduced in written form in the normal course of business or is certified as a true and accurate copy of the data recorded at the Commission in the normal course of its business shall be treated as a signed original in all uses before the Commission and as a duplicate within the meaning of Rule 1003 of the North Carolina Rules of Evidence. (1929, c. 120, s. 66; 1945, c. 766; 1991, c. 703, s. 9; 1991 (Reg. Sess., 1992), c. 894, s. 3; 1993 (Reg. Sess., 1994), c. 679, s. 10.8.)

§ 97-93. Employers required to carry insurance or prove financial ability to pay for benefits; employers required to post notice; self-insured employers regulated by Commissioner of Insurance.

(a) Every employer subject to the provisions of this Article relative to the payment of compensation shall either:

(1) Insure and keep insured his liability under this Article in any authorized corporation, association, organization, or in any mutual insurance association formed by a group of employers so authorized; or

(2) Furnish to the Commissioner of Insurance satisfactory proof of the employer's financial ability, either alone or through membership in a group of two or more employers who are members of the same trade or professional association and who agree to pool their liabilities under this Article, to directly pay the compensation in the amount and manner and when due as provided for in this Article. The trade or professional association must have been incorporated in North Carolina and in existence at least five years prior to the date of application to the Commissioner of Insurance to form a self-insurer's fund and shall submit a written determination from the Internal Revenue Service that it is exempt from taxation under 26 U.S.C. § 501(c).

A group organized and approved under this subdivision prior to July 1, 1995, is not required to consist of employers of the same trade or professional association, have existed for five years, have been incorporated in North Carolina, or furnish the determination of tax-exempt status under 26 U.S.C. § 501(c).

(b) In the case of subdivision (a)(2) of this section, the Commissioner of Insurance may require the deposit of an acceptable security, indemnity, or bond to secure the payment of compensation liabilities as they are incurred. Any individual employer or group of employers who furnish proof of financial ability under subdivision (a)(2) of this section shall be governed in all respects by this Article and by rules adopted by the Commissioner of Insurance.

(c) Payment of dividends to the members of any group of employers who agree to pool their liabilities under subdivision (a)(2) of this section shall not be contingent upon the maintenance or continuance of membership in such pools.

(d) Groups of two or more employers who agree to pool their liabilities under subdivision (a)(2) of this section are subject, in addition to the provisions cited in G.S. 58-2-145(a), to G.S. 58-2-165, G.S. 58-3-81, 58-6-25, 58-7-50, 58-7-55, 58-7-140, 58-7-160, 58-7-162, 58-7-163, 58-7-165, 58-7-167, 58-7-168, 58-7-170, 58-7-172, 58-7-173, 58-7-177, 58-7-179, 58-7-180, 58-7-183, 58-7-185, 58-7-187, 58-7-188, 58-7-192, 58-7-193, 58-7-195, 58-7-197, 58-7-200, and Articles 13, 19, 30, and 34 of Chapter 58 of the General Statutes.

(e) Every employer who is in compliance with the provisions of subsection (a) of this section shall post in a conspicuous place in places of employment a notice stating that employment by this employer is subject to the North Carolina Workers' Compensation Act and stating whether the employer has a policy of insurance against liability or qualifies as a self-insured employer. In the event the employer allows its insurance to lapse or ceases to qualify as a self-insured employer, the employer shall, within five working days of this occurrence, remove any notices indicating otherwise. (1929, c. 120, s. 67; 1943, c. 543; 1973, c. 1291, s. 12; 1979, c. 345; 1983, c. 728; 1985, c. 119, s. 1; 1993, c. 120, ss. 1, 2; 1993 (Reg. Sess., 1994), c. 679, s. 8.2; 1995, c. 193, s. 64; c. 471, s. 1.)

Editor's Note. — This section was amended by Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.2, in the coded bill drafting format provided by § 120-20.1. However, the section as amended by that act did not include the amendments to subsections (b) and (d) by Session Laws 1993, c. 120, ss. 1 and 2. The section has been set out above at the direction of the Revisor of Statutes.

Session Laws 1995, c. 193, s. 67 contains a severability clause.

Effect of Amendments. — Session Laws 1995, c. 193, s. 64, effective June 7, 1995, in subsection (d) substituted "G.S. 58-3-81" for "G.S. 58-3-80" and deleted "58-7-190".

Session Laws 1995, c. 471, s. 1, effective October 1, 1995, in subdivision (a)(2), in the first sentence substituted "of" for "comprising" preceding "two or more", added "are members of the same trade or professional association and who", and added the last sentence of the first paragraph and the second paragraph; and in subsection (d) substituted "of" for "comprising" preceding "two or more", added "in addition to the provisions cited in G.S. 58-2-145(a)", substituted "G.S. 58-2-165, 58-6-25" for "G.S. 58-3-80", deleted "58-7-190" following "58-7-188", and added "30" following "Articles 13, 19".

CASE NOTES

Cited in Woodson v. Rowland, 329 N.C. 330, 407 S.E.2d 222 (1991); Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992); Christian v. Riddle & Mendenhall Logging, 117 N.C. App. 261, 450 S.E.2d 510 (1994); Nicholson v. Adkins, 183 Bankr. 702 (Bankr. M.D.N.C. 1995).

§ 97-94. Employers required to give proof that they have complied with preceding section; penalty for not keeping liability insured; review; liability for compensation; failure to secure payment of compensation a misdemeanor.

(a) Every employer subject to the compensation provisions of this Article shall file with the Commission, in form prescribed by it, as often as the Commission determines to be necessary, evidence of its compliance with the provisions of G.S. 97-93 and all other provisions relating thereto.

(b) Any employer required to secure the payment of compensation under this Article who refuses or neglects to secure such compensation shall be punished by a penalty of one dollar ($1.00) for each employee, but not less than fifty dollars ($50.00) nor more than one hundred dollars ($100) for each day of such refusal or neglect, and until the same ceases; and he shall be liable during continuance of such refusal or neglect to an employee either for compensation under this Article or at law at the election of the injured employee.

The penalty herein provided may be assessed by the Industrial Commission administratively, with the right to a hearing if requested within 30 days after notice of the assessment of the penalty and the right of review and appeal as in other cases. Enforcement of the penalty shall be made by the Office of the Attorney General.

(c) Any employer required to secure the payment of compensation under this Article who willfully refuses or neglects to secure such compensation shall be guilty of a Class 1 misdemeanor.

(d) Any person who, with the ability and authority to bring an employer in compliance with G.S. 97-93, wilfully and intentionally refuses or neglects to bring the employer in compliance, shall be guilty of a Class 1 misdemeanor and may be assessed a civil penalty by the Commission in an amount up to one hundred percent (100%) of the amount of any compensation due the employer's employees injured during the time the employer failed to comply with G.S. 97-93. Notwithstanding the provisions of G.S. 97-101, the Commission may suspend collection or remit all or part of the civil penalty on condition that the employer pays the compensation due and complies with G.S. 97-93. (1929, c. 120, s. 68; 1945, c. 766; 1963, c. 499; 1973, c. 1291, s. 13; 1985, c. 119, s. 4; 1985 (Reg. Sess., 1986), c. 1027, s. 54; 1987, c. 729, s. 17; 1993, c. 539, s. 681; 1994, Ex. Sess., c. 24, s. 14(c); 1993 (Reg. Sess., 1994), c. 679, s. 8.1.)

Editor's Note. — Session Laws 1993, c. 539, s. 681, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993 (Reg. Sess., 1994), c. 679, s. 8.1, "The Workers' Compensation Reform Act of 1994," which amended this section, was effective October 1, 1994, and applicable to violations occurring on or after that date.

Legal Periodicals. — For survey, "The North Carolina Workers' Compensation Act of 1994: A Step in the Direction of Restoring Balance," see 73 N.C.L. Rev. 2502 (1995).

CASE NOTES

Applied in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-95. Actions against employers failing to effect insurance or qualify as self-insurer.

CASE NOTES

Construction with § 1-440.2. — This section provides a further action in which attachment may be had, and which must be read in pari materia with § 1-440.2. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

An employer must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Employer's lack of workers' compensation insurance does not bar an employee's remedy through workers' compensation. Ryles v. Durham Co. Hosp. Corp., 107 N.C. App. 455, 420 S.E.2d 487, cert. denied, 333 N.C. 169, 424 S.E.2d 406 (1992).

Attachment. —

This section merely provides an avenue to allow for attachment where an employer (1) is uninsured or fails to qualify as a self-insurer, and (2) owns property in the State susceptible to disposal or removal; as such, plaintiff's affidavit must meet one of the grounds for attachment listed in §§ 1-440.2 and 1-440.11. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338

N.C. 519, 452 S.E.2d 814 (1994).

The rights of a plaintiff in an action under this section are the same as those of any other plaintiff in a civil action. Nelson v. Hayes, 116 N.C. App. 632, 448 S.E.2d 848, cert. denied, 338 N.C. 519, 452 S.E.2d 814 (1994).

Cited in Zocco v. United States, Dep't of Army, 791 F. Supp. 595 (E.D.N.C. 1992).

§ 97-99. Law written into each insurance policy; form of policy to be approved by Commissioner of Insurance; cancellation; single catastrophe hazards.

(a) Every policy for the insurance of the compensation herein provided, or against liability therefor, shall be deemed to be made subject to the provisions of this Article. No corporation, association or organization shall enter into any such policy of insurance unless its form shall have been approved by the Commissioner of Insurance. No policy form shall be approved unless the same shall provide a 30-day prior notice of an intention to cancel same by the carrier to the insured by registered mail or certified mail. This shall not apply to the expiration date shown in the policy. The carrier may cancel the policy for nonpayment of premium on 10 days' written notice to the insured, and the insured may cancel the policy on 10 days' written notice to the carrier. Whenever notice of intention to cancel is required to be given by registered or certified mail, no cancellation by the insurer shall be effective unless and until such method is employed and completed.

(b) This Article shall not apply to policies of insurance against loss from explosion of boilers or flywheels or other similar single catastrophe hazards: Provided, that nothing herein contained shall be construed to relieve the employer from liability for injury or death of an employee as a result of such explosion or catastrophe. (1929, c. 120, s. 72; 1943, c. 170; 1945, c. 381, s. 1; 1959, c. 863, s. 5; 1967, c. 1218; 1993, c. 504, s. 31.)

CASE NOTES

There is no requirement that the notice of intent to cancel due to nonpayment of premium be sent by registered or certified mail. Wilson v. Claude J. Welch Bldrs. Corp., 115 N.C. App. 384, 444 S.E.2d 628 (1994).

Evidence of Receipt of Notice. — In dispute between insurance companies where there was evidence that one insurer sent employer, by certified mail, a properly addressed, postage pre-paid notice of its intent to cancel the workers' compensation insurance policy, however, there was no evidence that employer's agent, his secretary whose duties included handling the mail, did not receive the letter, the inference created by the establishment of the prima facie case, that the letter was received, was not rebutted. Wilson v. Claude J. Welch Bldrs. Corp., 115 N.C. App. 384, 444 S.E.2d 628 (1994).

Cited in Plummer v. Kearney, 108 N.C. App. 310, 423 S.E.2d 526 (1992).

§ 97-100. Rates for insurance; carrier to make reports for determination of solvency; tax upon premium; wrongful or fraudulent representation of carrier punishable as misdemeanor; notices.

(a) The rates charged by all carriers of insurance, including the parties to any mutual insurance association writing insurance against the liability for compensation under this Article, shall be fair, reasonable, and adequate.

(b) Each insurance carrier shall report to the Commissioner of Insurance, in accordance with rules adopted by the Commissioner of Insurance, for the purpose of determining the solvency of the carrier and the adequacy of its rates; for this purpose the Commissioner of Insurance may inspect the books and records of any insurance carrier, and examine its agents, officers, and directors under oath.

(c) Every insurer under this Article, every employer carrying its own risk under G.S. 97-93, and every group of employers that has pooled the employers' liabilities under G.S. 97-93 is subject to the premiums tax levied in Article 8B of Chapter 105 of the General Statutes.

(d) through (f). Repealed by Session Laws 1995, c. 360, s. 1, effective January 1, 1996.

(g) Any person who acts or assumes to act as agent for any insurance carrier whose authority to do business in this State has been suspended, while the suspension remains in force, who neglects or refuses to comply with any of the provisions of this section, or who willfully makes a false or fraudulent statement of the business or condition of any insurance carrier, is guilty of a Class 2 misdemeanor.

(h) Whenever by this Article, or the terms of any policy contract, any officer is required to give any notice to an insurance carrier, the notice may be given by delivery, or by mailing by registered letter properly addressed and stamped, to the principal office or general agent of the insurance carrier within this State, or to its home office, or to the secretary, general agent, or chief officer of the carrier in the United States, or to the Commissioner of Insurance.

(i) through (k). Repealed by Session Laws 1995, c. 360, s. 1, effective January 1, 1996. (1929, c. 120, s. 73; 1931, c. 274, s. 13; 1947, c. 574; 1961, c. 833, s. 13; 1977, c. 828, s. 7; 1985, c. 119, s. 2; 1985 (Reg. Sess., 1986), c. 928, s. 13; 1989, c. 647, s. 1; 1993, c. 539, s. 682; 1994, Ex. Sess., c. 24, s. 14(c); 1995, c. 360, s. 1(h).)

Editor's Note. — Session Laws 1993, c. 539, s. 682, which amended this section, in s. 1359, as amended by Session Laws 1994, Extra Session, c. 24, s. 14(c), provides: "This act becomes effective October 1, 1994, and applies to offenses occurring on or after that date. Prosecutions for offenses committed before the effective date of this act are not abated or affected by this act, and the statutes that would be applicable but for this act remain applicable to those prosecutions."

Session Laws 1993, c. 40, s. 1, effective May 5, 1993, provides: "All insurers writing workers' compensation insurance in this State and groups that self-insure their workers' compensation liabilities in this State, shall file with the commissioner by October 1, 1993, their loss control and accident prevention consultation services plans."

Effect of Amendments. — The 1995 amendment, effective January 1, 1996, rewrote this section.

§ 97-101. Collection of fines and penalties.

CASE NOTES

Cited in McCorkle v. Aeroglide Corp., 115 N.C. App. 651, 446 S.E.2d 145 (1994); Canady v. McLeod, 116 N.C. App. 82, 446 S.E.2d 879 (1994).

ARTICLE 3.

Security Funds.

§§ 97-105 through 97-122: Repealed by Session Laws 1991 (Regular Session, 1992), c. 802, s. 12, as amended by Session Laws 1991 (Regular Session, 1992), c. 1030, s. 51.3, effective January 1, 1993.

Cross References. — As to disposition of funds in the Stock Workers' Compensation Security Fund and the Mutual Workers' Compensation Security Fund, see §§ 58-48-105 through 58-48-130.

ARTICLE 4.

North Carolina Self-Insurance Guaranty Association.

§ 97-133. Powers and duties of the Association.

(a) The Association shall:

(1) Obtain from each member self-insurer and file with the Commissioner individual reports specifying the aggregate benefits each member paid during the previous calendar year, and the annual standard premium that would have been paid by the individual member self-insurer during the previous calendar year, pursuant to manual rates established by the North Carolina Rate Bureau and using the experience rating procedure approved by the Commissioner for that member self-insurer or the annual premium collected by each group member self-insurer during the prior calendar year. These reports shall be due on or before July 15 following the close of that calendar year, except that this deadline may be extended by the Commissioner for up to three additional months for good cause shown.

(2) Assess each member of the Association as follows:

a. Each individual member self-insurer shall be annually assessed an amount equal to one-quarter of one percent (0.25%) of the annual standard premium that would have been paid by that member self-insurer for workers' compensation insurance during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Where any such assessment is paid based in whole or in part upon estimates of annual standard premium for the prior calendar year, there shall be made in the next year's assessment an adjustment of the assessment of such prior year based on actual audited annual standard premium. Each group member self-insurer shall be annually assessed an amount equal to one-quarter of one percent (0.25%) of the annual premium collected by the group member self-insurer during the prior calendar year; and payment to the Association shall be made no later than September 15 following the close of that calendar year. Regardless of the size of the Fund, during its first 12 months of membership, no member self-insurer may discount or reduce this one-quarter of one percent (0.25%) assessment. Assessments paid by members pursuant to this subdivision shall be credited toward the tax paid by self-insurers under G.S. 105-228.5 and G.S. 97-100.

b. Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

c. If a self-insurer is a member of the Association for less than a full calendar year, the annual standard premium shall be adjusted by that portion of the year the self-insurer is not a member of the Association.

d. If application of the contribution rates referenced in sub-subdivisions a. and b. of this subdivision would produce an amount in excess of the five million dollar ($5,000,000) limits of the fund, an equitable proration may be made; provided that every self-insurer that becomes a member of the Association shall pay an initial assessment, in an amount established by the Board, regardless of the size of the fund at the time the member joins the Association.

(3) Administer a fund, to be known as the North Carolina Self-Insurance Guaranty Fund, which shall receive the assessments required in subdivision (2) of this subsection. Once the Fund reaches five million dollars ($5,000,000), no further assessments shall be made except initial assessments of new member self-insurers that are required to be made in subdivision (2)d. of this subsection. Assessments may be subsequently made only to maintain the Fund at a level of five million dollars ($5,000,000). In its discretion, the Board may determine that the assets of the Fund should be segregated, or, that a separate accounting shall be made, in order to identify that portion of the Fund which represents assessments paid by individual self-insurers and that portion of the Fund which represents assessments paid by group self-insurers. If the Board determines to segregate the Fund in this manner, the Association shall thereafter pay covered claims against individual member self-insurers from that portion of the Fund which represents assessments against individual self-insurers and shall thereafter pay covered claims against group member self-insurers from that portion of the Fund which represents assessments against group self-insurers. The cost of administration incurred by the Association shall be borne by the Fund and the Association is authorized to secure reinsurance and bonds and to otherwise invest the assets of the Fund to effectuate the purpose of the Association, subject to the approval of the Commissioner. All earnings

from investment of Fund assets shall be placed in or credited to the Fund.

The Association may purchase primary excess insurance from an insurer licensed by the Commissioner for the appropriate lines of authority to defray its exposure to loss occasioned by the default of one of its members. The terms of any excess insurance so purchased shall be limited to providing coverage of liabilities which exceed the Fund's assets after the payment by member self-insurers of the maximum post-insolvency assessment provided in subdivision (c)(1) of this section herein and the Association shall fund any such purchase by levying a special assessment on its members for this purpose or by application of any unencumbered earnings of the Fund or any other available funds. The Association may obtain from each member any information the Association may reasonably require in order to facilitate the securing of this primary excess insurance. The Association shall establish reasonable safeguards designed to insure that information so received is used only for this purpose and is not otherwise disclosed;

(4) Be obligated to the extent of covered claims occurring prior to the determination of the member self-insurer's insolvency, or occurring after such determination but prior to the obtaining by the self-insurer of workers' compensation insurance as otherwise required under this Chapter. The Association shall pay claims against a self-insurer that are not or have not been paid as a result of a determination of insolvency or the institution of bankruptcy or receivership proceedings that occurred prior to the effective date of this Article; provided that any assessments made to pay such claims may be credited towards the tax paid by the self-insurers under G.S. 97-100;

(5) After paying any claim resulting from a self-insurer's insolvency, be subrogated to the rights of the injured employee and dependents and be entitled to enforce liability against the self-insurer by any appropriate action brought in its own name or in the name of the injured employee and dependents;

(6) Assess the Fund in an amount necessary to pay only:
  a. The obligations for the Association under this Article subsequent to an insolvency;
  b. The expenses of handling covered claims subsequent to an insolvency;
  c. The cost of examinations under G.S. 97-137; and
  d. Other expenses authorized by this Article;

(7) Investigate claims brought against the Association and adjust, compromise, settle, and pay covered claims to the extent of the Association's obligation; and deny all other claims. The Association may review settlements to which the insolvent self-insurer was a party to determine the extent to which such settlements may be properly contested;

(8) Notify such persons as the Commissioner directs under G.S. 97-136;

(9) Handle claims through its employees or through one or more self-insurers or other persons designated as servicing

facilities. Designation of a servicing facility is subject to the approval of the Commissioner, but designation of a member self-insurer as a servicing facility may be declined by such self-insurer;

(10) Reimburse each servicing facility for obligations of the Association paid by the facility and for expenses incurred by the facility while handling claims on behalf of the Association;

(11) Pay the other expenses of the Association authorized by this section; and

(12) Establish in the Plan a mechanism to calculate the assessments required by subdivisions (1), (2), and (3) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.

(b) The Association may:

(1) Employ or retain such persons as are necessary to handle claims and perform other duties of the Association;

(2) Borrow funds necessary to effect the purposes of this Article in accord with the Plan;

(3) Sue or be sued;

(4) Negotiate and become a party to such contracts as are necessary to carry out the purpose of this section; and

(5) Perform such other acts as are necessary or proper to effectuate the purpose of this section.

(c) In the event that the assets of the Fund are not sufficient to pay the obligations of the Association, then the Association shall impose an additional assessment upon its members, which shall be known as a post-insolvency assessment which shall be imposed as follows:

(1) Each individual member self-insurer shall be assessed in an amount not to exceed two percent (2%) each year of the annual standard premium that would have been paid by that member self-insurer during the prior calendar year. The assessments of each individual member self-insurer shall be in the proportion that the annual standard premium of the individual member self-insurer for the premium calendar year bears to the annual standard premium of all individual member self-insurers for the preceding calendar year. For group member self-insurers, the assessment shall not exceed two percent (2%) each year the annual premium collected by that group member self-insurer during the prior calendar year. The assessments of each group member self-insurer shall be in the proportion that the annual collected premium of the group member self-insurer for the premium calendar year bears to the annual collected premium of all group member self-insurers for the preceding calendar year.

(2) Each member self-insurer shall be notified of the assessment no later than 30 days before it is due.

(3) The Association may exempt or defer, in whole or in part, the assessment of any member self-insurer, if the assessment would cause that member's financial statement to reflect liabilities in excess of assets.

(4) Delinquent assessments, except as provided in subdivision (3) of this subsection, shall bear interest at the rate to be established by the Board, but not to exceed the discount

rate of the Federal Reserve Bank, Richmond, Virginia, on the due date of the assessment, plus four percent (4%) annually, computed from the due date of the assessment.

(5) The Association shall establish in the Plan a mechanism to calculate the assessments required by subdivision (1) of this subsection by a simple and equitable means to convert from policy or fund years that are different from a calendar year.

(d) No individual member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual standard premium that would have been paid by that individual member self-insurer during the prior calendar year. No group member self-insurer may be assessed in any calendar year an amount greater than two and one-half percent (2.5%) of the annual premium collected by that group member self-insurer during the prior calendar year. If the maximum assessment does not provide in any one year an amount sufficient to make all necessary payments, the funds available shall be prorated and the unpaid portion shall be paid as soon thereafter as funds become available. There shall be established in the Plan a mechanism to calculate the assessments required by this section by a simple and equitable means to convert from policy or fund years that are different from a calendar year. (1985 (Reg. Sess., 1986), c. 928, s. 1(a); 1985 (Reg. Sess., 1986), c. 1013, s. 1; 1987, c. 528, ss. 4-10; 1989, c. 485, s. 27; 1995, c. 533, s. 1.)

Effect of Amendments. — The 1995 amendment, effective for taxable years beginning on or after January 1, 1995, in subdivision (a)(2)a., substituted "one-quarter of one percent (0.25%)" for "one-half of one percent (0.5%)" three times and added the last sentence; substituted "five million dollar ($5,000,000) limits" for "one million dollar ($1,000,000) limits" in subdivision (a)(2)d.; and twice substituted "five million dollars ($5,000,000)" for "one million dollars ($1,000,000)" in subdivision (a)(3).

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1996

I, Michael F. Easley, Attorney General of North Carolina, do hereby certify that the foregoing 1996 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by Michie under the supervision of the Department of Justice of the State of North Carolina.

MICHAEL F. EASLEY

Attorney General of North Carolina

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